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Sup. Ct.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1386

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

—against—

RHODA S. GAUNT, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALLACE W. BROWN,
Attorney for Petitioner.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

INDEX.

PAGE

Petition for Writ of Certiorari:

Summary and Short Statement of the Matter Involved 2

As to Reformation..... 3

Bases of the Alleged Contract (with reformation assumed) 4

As to Insurability..... 6

Jurisdiction 8

The Questions Presented..... 8

Reasons for Allowance of Writ of Certiorari.... 10

Conclusion 13

Brief in Support of Petition for Writ of Certiorari:

Preliminary Statement 15

Opinions of the Courts Below..... 15

Grounds for Writ of Certiorari..... 16

Statutory Provisions 16

Statement of the Case..... 16

Errors to Be Urged 17

Summary of Argument..... 17

Argument 18

I. The controlling local law, ignored by the Circuit Court of Appeals, plainly required denial of the prayer for reformation of the application 18

He Who Seeks Equity Must Himself Do Equity 21

II. The petitioner entered into no contract of life insurance with Gaunt; and the Circuit Court of Appeals, in holding that it did, did so arbitrarily and in disregard of fact and applicable local law..... 23

PAGE

1. The Bases of Contract, Except for an Offer by Gaunt, Were Totally Absent.. 23

2. The Circuit Court of Appeals, in Construing the Language of Application and Receipt, Misapprehended and Failed to Follow the Controlling Authorities.. 28

Division in the Court; the Majority's Doubts 34
Rules of Construction..... 36

3. Insurability of the Applicant Under the Petitioner's Rules Was Not Established by the Respondent..... 38

Conclusion 40

Appendix 41

TABLE OF CASES CITED:

Alfred M. Best Co., Inc. v. *Goldstein,* 124 Conn. 597, 1 Atl. (2) 140 (1938) 24, 25, 26

Allen v. *Massachusetts Mutual Accident Association,* 167 Mass. 18, 44 N. E. 1053 (1896) [opinion by Holmes, *J.*] 24

Arcuri v. *Prudential Insurance Company of America,* 290 N. Y. S. 567, 248 App. Div. 501 (1936).....30, 33

Basinsky v. *National Casualty Company,* 122 Wash. 1, 209 Pac. 1077 (1922) 32

Bogosian v. *New York Life Insurance Company,* 315 Mass. 375, 53 N. E. (2) 217 (1944).....19, 20

Boretz v. *Segar,* 124 Conn. 320, 199 Atl. 548 (1938).. 22

Braman, et ux. v. *Mutual Life Insurance Company of New York,* 73 Fed. (2) 391 (C. C. A. 8, 1934)... 30

Buono v. *Prudential Insurance Company of America,* 267 N. Y. S. 972, 240 App. Div. 898 (1933)..... 33

PAGE

Carpenter v. *Continental Casualty Company*, 95 Fed. (2) 634 (C. C. A. 8, 1938) 37

Cauman v. *American Credit Indemnity Company*, 229 Mass. 278, 118 N. E. 259 (1918)..... 19

Cooksey v. *Mutual Life Insurance Company*, 73 Ark. 117, 83 S. W. 317 (1904) 32

Corning v. *Prudential Insurance Company of America*, 288 N. Y. S. 661, 248 App. Div. 187 (1936); affirmed 273 N. Y. 668, 8 N. E. (2) 338 (1937).31, 33, 34

Duncan v. *John Hancock Mutual Life Insurance Company*, 137 Ohio St. 441, 31 N. E. (2) 88 (1940).. 34

Eastern Bridge & Structural Co. v. *Curtis Building Co.*, 89 Conn. 571, 94 Atl. 921 (1915) 37, 38

Equitable Life Assurance Society of the United States v. *Deem*, 91 Fed. (2) 569 (C. C. A. 4, 1937)..... 37

Erie Railroad Company v. *Tompkins*, 304 U. S. 64 (1938) 10, 11, 18, 29

Field v. *Missouri State Life Ins. Co.*, 77 Utah 45, 290 Pac. 979 (1930) 32

Francis v. *Deming*, 59 Conn. 108, 21 Atl. 1006 (1890).26, 31

Gabbett v. *Connecticut General Life Insurance Company*, 303 Mass. 433 (1939) 39

Giddings v. *Insurance Company*, 102 U. S. 108 (1880) 31

Goldstein v. *New York Life Insurance Company*, 162 N. Y. S. 1088, 176 App. Div. 813 (1917); affirmed 227 N. Y. 575, 124 N. E. 898 (1919) 31, 39

Griffin, Administrator v. *McCoach, Trustee*, 313 U. S. 498 (1941) 19

Guaranty Trust Company v. *York*, 326 U. S. 99 (1945) 11, 29

Harris v. *Security Mutual Life Insurance Company*, 130 Tenn. 325, 170 S. W. 474 (1914) 39

Hart v. *Travelers Insurance Company*, 258 N. Y. S. 711, 236 App. Div. 309, affirmed 261 N. Y. 563, 185 N. E. 739 (1932) 33

PAGE

Hughes v. *John Hancock Mutual Life Insurance Company*, 297 N. Y. S. 116, 163 Misc. 31 (Municipal Court, 1937); judgment, as modified by the Appellate Term, affirmed, without opinion, 3 N. Y. S. (2) 899, 254 App. Div. 570 (1938) 31, 33

Insurance Company v. *Young's Administrator*, 23 Wall. 85 (1874) 32

Ivie v. *International Life Insurance Company*, 217 Ala. 559, 117 So. 176 (1928) 30

John Hancock Mutual Life Insurance Company v. *McClure*, 218 Fed. 597 (C. C. A. 3, 1914) 31

Kelly v. *John Hancock Mutual Life Insurance Company*, 131 Conn. 106, 38 Atl. (2) 176 (1944)..19, 21, 30

Klaxon Company v. *Stentor Electric Manufacturing Company, Inc.*, 313 U. S. 487 (1941).....11, 19

Leube v. *Prudential Ins. Co. of America*, Ohio St. , 72 N. E. (2) 76 (February 28, 1947) 34

Marks v. *Hope Mutual Life Insurance Company*, 117 Mass. 528 (1875) 24

Martin v. *Equitable Life Assurance Society*, 58 N. Y. S. (2) 845 (Supreme Court, Special Term, 1945) 31, 33

McCampbell v. *New York Life Insurance Company*, 288 Fed. 465 (C. C. A. 5, 1923) 30

Metropolitan Life Insurance Company v. *Cohen*, 96 F. (2) 66 (C. C. A. 2, 1938) 19, 24, 30, 31

Miller Brothers Construction Company v. *Maryland Casualty Company*, 113 Conn. 504, 155 Atl. 709 (1931) 37

New York Life Insurance Company v. *Veit, et al.*, 294 N. Y. 222, 62 N. E. (2) 45 (1945) 37

Northwestern Mutual Life Insurance Company v. *Neafus*, 145 Ky. 563, 140 S. W. 1026 (1911) 32

PAGE

O'Connor v. *Metropolitan Life Insurance Company*, 121 Conn. 599, 186 Atl. 564 (1936) 29

Piscitello v. *Boscarello*, 113 Conn. 128, 154 Atl. 168 (1931) 24

Polachek v. *New York Life Insurance Company*, 263 N. Y. S. 230 (1933), aff. 268 N. Y. S. 995 (1934).. 39

Porto v. *Metropolitan Life Insurance Company*, 120 Conn. 196, 180 Atl. 289 (1935) 37

Rocci v. *Massachusetts Accident Company*, 222 Mass. 336, 110 N. E. 972 (1916) 37

Rogers v. *Charter Oak Life Insurance Company*, 41 Conn. 97 (1874) 24

Ruhlin v. *New York Life Insurance Company*, 304 U. S. 202 (1938).....10, 29

Russo v. *Metropolitan Life Insurance Company*, 125 Conn. 132, 3 Atl. (2) 844 (1939).....19, 30

Savings Bank of New London v. *Santaniello*, 130 Conn. 206, 33 Atl. (2) 126 (1943) 22

Schiller v. *Metropolitan Life Insurance Company*, 295 Mass. 169, 3 N. E. (2) 384 (1936) 19

Shira v. *New York Life Insurance Company*, 90 Fed. (2) 953 (C. C. A. 10, 1937) 30

Standard Fur Cutting Co. v. *Caledonian Insurance Company*, 113 Conn. 108, 154 Atl. 153 (1931)....37, 38

Starr v. *Mutual Life Insurance Company*, 41 Wash. 228, 83 Pac. 116 (1905) 32

Stipcich v. *Metropolitan Life Insurance Company*, 277 U. S. 311 (1928) 39

Stonsz v. *Equitable Life Insurance Co.*, 324 Pa. 97, 187 Atl. 403 (1936) 34

Supreme Colony v. *Towne*, 87 Conn. 644, 89 Atl. 264 (1914) 24

Swentusky v. *Prudential Insurance Company*, 116 Conn. 526, 165 Atl. 686 (1933) 24, 25, 26, 30, 31

PAGE

Wehrhane v. *Peyton*, 133 Conn. 478, Atl. (1947) 29

West, et al. v. *American Telephone and Telegraph Co.*, 311 U. S. 223 (1940).....10, 11, 21, 29

Whitaker v. *Cannon Mills Company*, 132 Conn. 434, 45 Atl. (2) 120 (1945) 37

Whitney v. *Union Central Life Insurance Company*, 47 Fed. (2) 861 (C. C. A. 8, 1931) 30

Williams v. *Union Central Life Insurance Company*, 291 U. S. 170 (1933) 37

Winslow v. *Mutual Life Insurance Company of New York*, 93 Fed. (2) 802 (C. C. A. 9, 1938) 30

OTHER AUTHORITIES CITED:

General Statutes of Connecticut (Revision of 1930), Section 4182 .....16, 28, 30

Judicial Code:

Section 24 (1), as amended: 28 U. S. C. A., §41 (1), as amended 8

Section 128, as amended: 28 U. S. C. A., §225(a), First, and (d), as amended 8

Section 240(a), as amended: U. S. C., Title 28, §347; 28 U. S. C. A., §347 8

IN THE

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OCTOBER TERM, 1946.

No. .

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

—against—

RHODA S. GAUNT, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, John Hancock Mutual Life Insurance Company, a mutual life insurance corporation organized and existing under the laws of the Commonwealth of Massachusetts and located in the City of Boston thereof, respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Second Judicial Circuit to review a judgment of that Court, entered on March 31, 1947, which reversed [by Judges Learned Hand and Augustus N. Hand (Judge Charles E. Clark concurring in the result but dissenting in respect of the central issue)] a judgment of the District Court of the United States for the District of Connecticut entered for it, on April 18, 1946, in a civil action brought against it by Rhoda S. Gaunt, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased, respondent herein.

A certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals, is furnished herewith in accordance with paragraph 1 of Rule 38 of the Revised Rules of this Court.

Summary and Short Statement of the Matter Involved.

The respondent invoked the jurisdiction of the United States District Court for the District of Connecticut on the ground that she was of Waterbury, Connecticut, whereas the petitioner (although admitted to do business in Connecticut) was of Boston, Massachusetts. By her complaint, she sought, *first*, a reformation of an application for life insurance directed to the petitioner and, *second*, assuming reformation were granted, $30,000 in damages for an alleged breach of contract. As to the second, the allegation was that, given a reformed application, the petitioner had issued "a contract of temporary insurance". The respondent claimed, or anyway now claims, as designated beneficiary. The presently relevant facts of record, then, are these:

On August 3, 1943, in Waterbury, one James A. Gaunt, Jr., now deceased, signed an application, directed to the petitioner in Boston, for life insurance. Coincidentally, he made a premium advance, for which he was given a temporary receipt by the soliciting agent, one Morris Kelman, whose authority was confined to solicitation. [The premium advance was put in a local suspense account. It yielded no profit to the petitioner; and it was always subject to recall, along with the application itself, by the applicant.]

Both application and receipt were on the petitioner's standard forms, these forms being on file with the Insurance Commissioner for the State of Connecticut. Also on file with the Insurance Commissioner was the petitioner's standard form of policy which would have been issued had the application won approval, the application becoming a part of that policy.

As to Reformation.

This application, as transmitted to the petitioner and as the petitioner knew it until the respondent had made claim as designated beneficiary, recorded a desire upon his part to have the insurance applied for, if issued, effective from date of issue. Since the applicant was killed while underwriting activities relative to his application were in progress, and since those activities ceased as soon as the petitioner learned of that death, the file appeared closed except for returning the premium advance, which was duly tendered. The respondent, however, came forward with a claim that the application should be reformed to record—and do it retroactively to the day of its execution—a desire upon the applicant's part to have the insurance applied for effective as of the date of completion of Part B thereof. Without such reformation, as her counsel have always been forced to admit, there could be no conceivable cause of action against the petitioner. That claim, consequently, became the first prayer for relief in the complaint. The facts concerning it are briefly set forth as follows:

The application put various questions to Gaunt, the answers to which were to be recorded therein. One of these, *i. e.*, Item 12 of Part A (Part B relating exclusively to physical examination), called upon him to state whether he desired the insurance applied for to be effective as of date of Part B or date of issue of policy. This was to be done by checking either of two boxes provided for the purpose, the upper one for "Date of Part B", the lower one for "Date of issue of Policy". The lower one in fact was checked.

The solicitor, who wrote down all of Gaunt's answers for him, filled in Item 12 after he had signed. Since Gaunt, so the Trial Court found (a finding from which the petitioner did not appeal), had expressed a desire for date of Part B as the effective date, the checking of the lower box of Item 12 was without his knowledge or con-

sent; but, as the Trial Court also found, it "was due to a mutual mistake on the part of Gaunt and Kelman".

This issue of reformation, which the Trial Court declined to resolve for the respondent and which the Circuit Court of Appeals resolved in her favor only as one can imply so much from its monetary judgment in her favor (for its opinion ignores all argument, including citation of applicable and indeed conclusive local authority on the subject), resides not only in the facts thus recited but also in events occurring subsequent to execution of the application. The point here is that, not very long after Gaunt signed the application, he voluntarily conducted himself in such a way as to destroy, in the eyes of any life insurance company, whatever insurability he might otherwise have had; and this conduct he failed to divulge to the petitioner which, as he knew, had his application under consideration. When he met death, he was not only a man who had given up the job he held when he signed his application but he was illegally riding a freight train in the State of South Dakota. [And see *infra*, pp. 21-22].

In the petitioner's view this conduct of Gaunt's had a bearing not only on his insurability in the amount and on the plan for which he made application but also on the prayer for reformation, which lies in Equity. Its argument to that effect, however, is ignored by the opinion of the Circuit Court of Appeals.

Bases of the Alleged Contract

(with reformation assumed).

While the respondent recognized that she had no standing in court unless her prayer for reformation were first granted—a reformation which would put the petitioner in the fictitious situation of having received and considered an application differing from the one it in fact received and considered—, we shall now assume that this prayer was granted. She still had the burden, nevertheless, of establishing her allegation that application and receipt "constituted a contract of temporary insurance"

in effect at Gaunt's death. This burden, in the petitioner's view, was not even remotely discharged, the respondent failing in respect of both fact and law. Succinctly put, the essential facts on this issue, other than those already recited (*supra*, p. 2), are these:

The application contained certain conditions which were set forth directly over the applicant's signature. Those of the greatest present importance are "B" and "H", although "F" which reserved in the petitioner the right to require other evidence of insurability satisfactory to it continues to be pertinent also.

Condition "B", in plain and simple English, provided that *if* the petitioner were satisfied, in accordance with *its* rules, of the applicant's insurability "for the amount and on the plan applied for without modification", *and if* the application, *prior to his death*, were approved by it at its Home Office, then the insurance applied for should be in force as of the date of completion of Part B (physical examination, admittedly completed). These two conditions of "B", recognized by the respondent as such but with the claim that the second did not count, were set forth conjunctively and in the same sentence. They were separated by nothing more arresting than a comma.

Condition "H", also in plain and simple English, informed the applicant that if the petitioner did not approve the application within sixty days from the date of Part B, thereof, or if it did not give notice of action thereon, the application should be deemed to have been declined.

In the short temporary receipt which was given to the applicant for the premium advance, the content of Conditions "B" and "H" was repeated in virtually identical language; and these conditions, in fact, constitute the whole of the substantive text of that receipt. Clauses "B", "H" and "F", also the temporary receipt, are quoted in an appendix annexed to this petition and its supporting brief.

The Circuit Court of Appeals, by the necessary effect of its judgment, held *both* the approval-before-death and

the sixty-day clauses of application and receipt nugatory; indeed, it in effect rewrote both application and receipt by deleting these clauses (and Condition "F" also, for that matter) but permitting the clause relative to insurability to remain. In this way, and contrary to overwhelming weight of authority, local authority included, it *imposed* a contract upon the petitioner which the petitioner in express language had said it would not write.

As to Insurability.

Was the other part of Condition "B", *i. e.*, that relating to insurability, met? Did the plaintiff prove, as was her admitted burden, that, except for the applicant's death, a policy "for the amount and on the plan applied for without modification" would have been issued to him? The Trial Court answered in the affirmative. This conclusion was challenged by the petitioner, in an argument ignored by the opinion of the Circuit Court of Appeals, as unwarranted by the subsidiary or basic findings of fact which, indeed, unanswerably compelled an opposite conclusion, *i. e.*, that the respondent's burden had *not* been met. It was always the petitioner's position that the applicant was not insurable under its rules in the amount and on the plan applied for without modification. And it must be remembered that any modification at all—in amount, plan, premium rate or otherwise—would at law have amounted to a rejection of the application, as counsel for the respondent have acknowledged.

Recital of all facts and factors relating to insurability need not be undertaken here since the affirmative and unchallenged findings of subsidiary fact concerning the need for reinsurance under the petitioner's rules, together with what otherwise appears about the applicant's conduct subsequent to date of application (*supra* and *infra*, pp. 4, 21-22), are determinative.

One of the petitioner's rules was that, in the type of risk presented by this application, it would not itself

assume a burden of more than $10,000, principal amount. Since the application was for $15,000, principal amount (plus double indemnity, so-called, for certain types of accidental death), it would have transmitted it, with pertinent data, to its reinsurer, Lincoln National Life Insurance Company of Indianapolis, Indiana, for approval or disapproval as to the surplusage of $5,000, *assuming* it had first decided that, for its own part, it was willing to insure the risk in the amount of its stated ceiling of $10,000. [Such transmittal it would have made, as the unchallenged finding shows, despite its power to bind Lincoln summarily.]

As heretofore said, the petitioner ceased underwriting activities on the application when it learned that, on the night of August 24-25, 1943, Gaunt had been killed while illegally aboard a freight train in South Dakota. Thus, whatever might have been its own decision concerning the application had Gaunt lived, it regarded the matter as thenceforward academic and, of course, did not transmit it to Lincoln.

Lincoln, then, never saw the application. It was never asked by anyone, *not even by the respondent—at least not in court or by deposition—*, to say what it would have done, or thinks it would have done, had the application been laid before it for decision.

The respondent consequently failed to discharge her burden of proof on this subject which was to show that, but for the applicant's death, the policy in the amount and on the plan applied for, without modification, would have been issued; and the judicial conclusion that such a policy would have been issued, it is manifest, rests on a vacuum—if for no other reason than that the necessary reinsurance link, an integral part of the petitioner's rules, is missing. In this connection, one should bear in mind that, as counsel for the respondent concede, the application would have stood rejected had Lincoln done anything less than wholly to approve the application,

had it been asked to act, *in the amount and on the plan applied for, without modification.*

Jurisdiction.

Jurisdiction of the District Court, as appears *supra* at page one, was based solely on diversity of citizenship. [Judicial Code, section 24(1), as amended: 28 U. S. C. A., §41(1), as amended.]

From a judgment in the District Court for the petitioner, the respondent appealed to the Circuit Court of Appeals for the Second Circuit under Section 128, as amended, of the Judicial Code. [28 U. S. C. A., §225(a), First, and (d), as amended.]

This Court, by virtue of subparagraph (a) of Section 240, as amended, of the Judicial Code, has power and authority, acting upon this petition, to require certification to it, by certiorari, of the cause before the Circuit Court of Appeals, including its judgment, for purposes of full review and determination [U. S. C., Title 28, §347; 28 U. S. C. A., §347.]

The Questions Presented.

The questions presented by this petition for a writ of certiorari are these:

1. Whether or not the Circuit Court of Appeals erred in holding, specifically as to the issue of construction of the language of application and receipt and by necessary implication as to the other issues (*i. e.*, reformation, the requisites of contract, insurability), the basic facts concerning which appear *supra,* that there was an absence of applicable local law, *i. e.,* Connecticut law as ruled by the lower courts.

2. Whether or not, even were there an absence of controlling local decisions and statutes (which is emphatically

denied), the Circuit Court of Appeals could ignore or fail to find and follow the overwhelming weight of, even if not unanimous, authority in the petitioner's favor in other jurisdictions on the issues of construction and reformation, especially as Connecticut (see *infra*, p. 29) would follow that authority under previously established doctrine and practice.

3. Whether or not the Circuit Court of Appeals erred in rendering a decision which, widely departing from the accepted and usual course of judicial proceedings, fails not only to treat but even to mention certain record facts and claims of law upon which the petitioner reasonably placed reliance.

4. Whether or not the Circuit Court of Appeals erred in rendering a judgment which, of necessity, held *all* of these things, even where the opinion did not so declare, namely:

(a) That the application in the hands of the petitioner should be reformed so as to have the applicant's choice of effective date of any policy issued read as the date of completion of Part B thereof rather than date of issue, the way it was written, the petitioner to be retroactively bound to that reformation;

(b) That the application was not an offer, an offer which for want of acceptance, and acceptance before Gaunt's death, expired; but that some other contract arose, the anatomy of which (*e. g.*, the nature and content of the offer, the acceptance, the consideration or mutuality of obligation) goes unexplained, as does the question of how it responds to the allegations of the complaint;

(c) That the approval-before-death and the sixty-day clauses of application and receipt were null and void and, in effect therefore, should be totally deleted therefrom (and so, too, with Clause "F");

(d) That the applicant was insurable under the petitioner's rules for the amount and on the plan applied for without modification, and so continued from the standpoint of right to the date of his death, and that, but for his death, a policy for the amount and on the plan applied for, without modification, would have been issued to him.

Reasons for Allowance of Writ of Certiorari.

The discretionary power of this Court to issue a writ of certiorari is invoked upon the following grounds:

1. The Circuit Court of Appeals signally failed to follow applicable local decisions which directly pointed to and would, in the controlling local jurisdiction, *i. e.*, Connecticut, certainly have resulted in a judgment for the respondent. More than this, the court, taking the only issue concerning basic liability to which it expressly directed itself, namely, construction of the clauses of application and receipt dealing with insurability and time for approval, exhibited a complete disregard for the well nigh, if not actually, unanimous general authorities resolving this issue in the petitioner's favor. These favorable authorities, which include every known decision of other circuit courts of appeal, Connecticut would have followed, assuming absence of determinative cases of its own, such being its practice and its law.

The attitude with which the court approached the case seems to be revealed in the last sentence of the concurring opinion, an attitude which manifested anxiety lest the court might abdicate its "judicial role" for that "of 'ventriloquist's dummy' as to state law". We do not see how the court could have done more than it did do to flout both letter and spirit of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 (1938), *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202 (1938), *West, et al.* v. *American Telephone and Telegraph Co.*, 311 U. S. 223

(1940), *Klaxon Company* v. *Stentor Electric Manufacturing Company, Inc.*, 313 U. S. 487 (1941), *Guaranty Trust Company* v. *York*, 326 U. S. 99 (1945), and allied cases.

We shall cite in our brief, annexed in support of this petition, those authorities which we believe to be controlling as the law of the local jurisdiction involved in the thought that by so doing we can best acquaint this Court, from its own standpoint, with their nature.

2. The judgment of the Circuit Court of Appeals amounts to a judicial fiat *imposing* a contractual liability upon the petitioner because, without explanation or comment, it brushes aside certain facts established of record as well as basic principles of contract law. The court's action, then, was something more than, as well as, a refusal or failure to adhere to the law enunciated by this Court in *Erie Railroad Company* v. *Tompkins* and its associated cases. It was, by its summary character, by its by-passing of sound defenses which could not legally or equitably be by-passed, so gross a departure from the accepted and usual course of judicial proceedings, and also a sanction of such a departure in respect to the District Court's conclusion of insurability, as to call for an exercise of this Court's power of supervision.

No one who read the record and briefs, including the petition for rehearing, before the Circuit Court of Appeals could, in our belief, say that the petitioner had had its day in court there.

As with the citation of controlling authorities mentioned under Ground 1 above, we shall defer particularization of this ground to our supporting brief, *infra*.

3. The case is an important one of general interest.

To right an injustice in any case; to set aright a court which has indulged in arbitrary rather than judicial practice; to compel obedience to the law of *Erie Railroad Company* v. *Tompkins*, and its allied cases, and to say

whether or not such means that, even were one to assume a want of decisive local decisions and statutes, weight of authority must be respected; to enunciate a uniform rule where, as here, the court, assuming itself to be free from the binding influence of other authorities, made a decision in conflict with every known decision of other circuit courts of appeal on the same subject:—these are matters of great and general importance which are brought forward by the judgment of the Circuit Court of Appeals in the case at bar.

Apart from such matters as these, however, we would call the Court's attention to the fact that this case deeply affects, in a nation-wide sense, the field of life insurance and other fields of insurance, such as health and accident, related to it. This is so, in particular, as to the issue of construction because the Circuit Court of Appeals' handling of that issue (with Judge Clark dissenting) is novel. It is, indeed, a handling which rewrites the petitioner's application and receipt forms; which, contrary to *all* respectable authority, forces a company into the acceptance of a contract it expressly said it would not accept or write; and, more than all this, which leaves the petitioner and every life insurance company (in fact, every insurance company) quite at sea as to what to expect next, as to what sort of buoy in the English language will provide a reliable channel marker.

We think it would be safe to hazard a guess that no life insurance decision in many years, particularly when one considers the prestige of the tribunal involved, has aroused an equal amount or attention among life insurance companies and persons interested in life insurance. And life insurance companies, of course, are not mere commercial enterprises. Existing policyholders, big and little, of whom there are many millions in this country, have a vital interest, whether or not they recognize it, in decisions like the one at bar. Perhaps we should add that with a mutual company like the petitioner, its policyholders *are* the company.

Conclusion.

From the foregoing we believe it to be evident that the Circuit Court of Appeals' judgment is one that should be reviewed by this Honorable Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and of all proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Court as provided by law; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to it may seem proper.

Respectfully submitted,

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

By Wallace W. Brown,
Attorney for Petitioner.

Hartford, Connecticut, May 16, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .

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—against—

RHODA S. GAUNT, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Opinions of the Courts Below.

The District Court's opinions, for there were in reality two dealing with the merits even though the second was technically directed to motions to amend findings of fact and conclusions of law, do not appear in the Federal Supplement. However, the first one, dated April 17, 1946, appears in 11 Life Cases (C. C. H.) 771, while the second one, dated July 23, 1946, appears in 11 Life Cases 980. These opinions also appear in Part I of the original record, *i. e.*, as certified by the Clerk of the Circuit Court of Appeals, at pages 58 and 75 respectively of "Appendix to Brief of Appellant".

At the date of this writing, the opinion of the Circuit Court of Appeals in the case, rendered March 31, 1947, is not to be found in the Federal Reporter. It does, however, appear in 12 Life Cases (C. C. H.), at page 423; also in Part III of the certified record, above mentioned. [The denial of the petition for rehearing on April 15, 1947, was without opinion.]

Grounds for Writ of Certiorari.

The petitioner's reasons or grounds for seeking a writ of certiorari are stated in the petition to which this brief is annexed, *supra*, pages 10-12. They also succinctly appear in our "Summary of Argument", *infra*, pages 17-18. To those citations reference is now respectfully made.

Statutory Provisions.

The jurisdictional statutes, which need no recitation, are cited under "Jurisdiction" in the petition (*supra*, p. 8). In the courts below, the petitioner cited as pertinent to its position about local insurance Section 4182 of the General Statutes of Connecticut (Revision of 1930), the text of which will be set forth under Point II of our argument, *infra*, page 28.

Statement of the Case.

The facts material to consideration of the petition for a writ of certiorari, except as supplemented somewhat in conjunction with the argument hereinafter presented, are set forth in pages 2-8 of that petition, to which reference is respectfully made; and so they need no repetition here.

Errors to Be Urged.

It is urged that the Circuit Court of Appeals erred in holding adversely to the petitioner on the issues, and each of them, set forth under "The Questions Presented" in the petition (*supra*, pp. 8-10), to which reference is respectfully made.

Summary of Argument.

The petitioner's argument in support of its petition may be summarized, as follows:

I. The refusal of the District Court to grant the respondent's prayer for reformation of the application should have been upheld by the Circuit Court of Appeals because application of controlling local decisions to the unchallenged facts of record (*supra*, pp. 3-4) required such a holding.

The Circuit Court of Appeals not only went counter to these decisions but, in so doing, clearly departed from the accepted and usual course of judicial proceedings. This is so because, except for a possible inference from the circumstance that the court directed a monetary judgment for the respondent, one cannot say that it even consciously passed upon the issue of reformation. It assuredly did not treat that issue, *i. e.*, express an opinion on the facts and law laid before it. And this failure occurred despite the fact that the issue was always recognized by the respondent's counsel as one preliminary to any other issue and that it constituted the first two of the respondent's five points of appeal (two of the remaining three having involved an unsuccessful attempt to secure double indemnity).

II. The Circuit Court of Appeals acted arbitrarily and contrary to the local law it was bound to honor, under

Erie Railroad Company v. *Tompkins* and allied cases (cited *supra*, pp. 10-11), in holding expressly or by necessary implication from the judgment it entered that: 1., The bases of a contract of life insurance were present; 2., the approval-before-death and sixty-day clauses of application and temporary receipt were null and void; and 3., the applicant, had he lived, would have received a policy in the amount and on the plan for which he applied, without modification. *All* of these holdings, in addition to reformation of the application as prayed, were of course necessary to rendition of a judgment for the respondent.

Argument.

I.

The controlling local law, ignored by the Circuit Court of Appeals, plainly required denial of the prayer for reformation of the application.

The District Court did not grant the respondent's prayer for reformation. The Circuit Court of Appeals, if it can be said to have ruled on the issue, did so only by its judgment which reversed the former court's judgment for the petitioner and directed one for the respondent.

While in the first paragraph of the majority opinion the facts incident to execution of the application and the checking of desired effective date are briefly recounted (although the fact of Kelman's telling Gaunt and the respondent that this application would proceed to the petitioner's home office for acceptance or rejection goes unmentioned), there is nothing else to indicate that the issue of reformation, an acknowledged prerequisite to all of the other issues, received any thought whatever; and certainly everything the petitioner said on the point in its brief, including citation of closely relevant decisions,

is disregarded. This kind of offense, which is repeated by the court in other respects, even as to the one issue (aside from that of double indemnity, not now pertinent) it did treat, is surely arbitrary practice in the extreme and hence a wide departure from the accepted and usual course of judicial proceedings.

Five decisions, two by the Connecticut Supreme Court of Errors, two by the Supreme Judicial Court of Massachusetts, and one by the Circuit Court of Appeals for the Second Circuit were submitted by the petitioner to the court below to show that, quite apart from the applicant's inequitable conduct occurring subsequent to date of application (see *supra* and *infra*, pp. 4, 7, 21-22), the application should not be reformed since an applicant must stand responsible for the content of his application. Those cases were:

Kelly v. *John Hancock Mutual Life Insurance Company*, 131 Conn. 106, 110, 38 Atl. (2) 176 (1944);
Russo v. *Metropolitan Life Insurance Company*, 125 Conn. 132, 137, 3 Atl. (2) 844 (1939);
Bogosian v. *New York Life Insurance Company*, 315 Mass. 375, 380-382, 53 N. E. (2) 217 (1944);
Cauman v. *American Credit Indemnity Company*, 229 Mass. 278, 284, 118 N. E. 259 (1918);
Metropolitan Life Insurance Company v. *Cohen*, 96 F. (2) 66 (C. C. A., 2, 1938).
[See also *Schiller* v. *Metropolitan Life Insurance Company*, 295 Mass. 169, 175, 3 N. E. (2) 384, 387 (1936)].

Connecticut was ruled by the District Court, with the concurrence of the Circuit Court of Appeals, to be the state whose law would control; and, of course, as to any question of conflict of laws between Connecticut and Massachusetts, the Connecticut rule would govern under *Klaxon Company* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941) and *Griffin, Administrator* v. *McCoach, Trustee*, 313 U. S. 498 (1941).

The question of whether Connecticut law exclusively, or Massachusetts law (whether fully or partially) under Connecticut's conflict of laws doctrine, ought to be applied in the case seemed to be of relatively little importance to us since, as is well known, these two New England states, lying adjacent to one another, tend to see eye to eye in legal matters. Both, too, contain cities—Hartford and Boston—which are national insurance centers. Certainly in the eyes of the Supreme Court of Errors of Connecticut no state court receives more, if as much, respect as does the Supreme Judicial Court of Massachusetts; and it would be arbitrary and contrary to all reasonable expectation to say that, assuming a want of a determinative case of its own on a point, Connecticut would not follow a relevant Massachusetts decision on that point. And, indeed, the same general observation would apply, perhaps with equal force, to Connecticut and New York (another insurance state), as Judge L. Hand appeared to recognize in colloquy between counsel during oral argument.

The cases cited above, in absence of other and more closely relevant cases which have yet to be produced, manifestly compel one conclusion on the issue of reformation, namely: that the prayer for reformation should be, as it was by the District Court, denied. On what theory is this controlling local law disregarded? We have no means of knowing. We cannot even know whether or not the Circuit Court of Appeals was conscious of the existence of the issue and the applicable law when it voted. The opinion simply greets one with *silence* on the subject.

The very recent *Bogosian* case (*supra*, p. 19), for instance, is one of those rare cases in the law which is almost precisely on all fours with the case at bar in so far as the issue of reformation goes. To it, indeed, the case at bar is plainly *a fortiori*. In that case an applica-

tion for reinstatement of life insurance rather than an application for an initial policy was involved. But the court held that the plaintiff applicant was bound by recorded answers to the questions put by the application form *despite the fact that, after his signature was affixed thereto, those answers were falsely written in by a reinstatement clerk who, in addition, falsely represented to the plaintiff that the instrument involved was not an application but a receipt.*

In the *Kelly* case (*supra*, p. 19), brought by the beneficiary of a life insurance policy after the assured's death, it was conceded that certain representations made in the application were untrue. But the plaintiff successfully claimed to a jury that these representations were not in fact made by the assured; that the soliciting agent filled in the answers; that he did not read the completed application to the assured, who signed in ignorance of its contents. (There was no issue of fraud or misrepresentation upon the part of the solicitor.) Reversing the lower court, the Supreme Court of Errors held that failure of the assured to know the contents of the application constituted "inexcusable negligence"; that she was under a duty to know its contents (131 Conn. 109-110).

How could the Circuit Court of Appeals, in the light of these cases, conceivably have said, if it did say anything by silence, that there was no applicable local law on this issue of reformation; that there was not even, so one might gather, any "available data" on the subject within the meaning of West, et al. v. American Telephone and Telegraph Company, 311 U. S. 223, 237 (1940)?

He Who Seeks Equity Must Himself Do Equity.

When he signed the application in August of 1943 Gaunt was an intelligent young bachelor (nearly 22 years old) of good moral reputation in his community. Classi-

fied "IV-F" by Selective Service in July of 1942 for defective vision of a relatively minor character, which required him to wear glasses, he was otherwise in sound health. So far as appears, he made no effort to enter the service but he did interrupt his college education to become a semi-skilled machine operator in a Waterbury war factory where, on August 3, 1943, the date of the application, he was still employed.

On August 15, 1943, Gaunt left this employment to carry out a decision previously taken, the exact time of which is unknown, to leave Waterbury and seek employment on the Pacific Coast or in Alaska. On August 17, 1943, a Waterbury physician, acting for the petitioner, gave him a second physical examination which it thought to be necessary. On August 19, 1943, Gaunt did leave Waterbury for the West; and in South Dakota, on the night of August 24-25, 1943, while "riding the rails" in violation of law, he was shot and killed by a companion whom he had picked up en route.

None of Gaunt's intentions and actions above described, and which he certainly knew would render him totally uninsurable, were divulged by him to the petitioner. This was distinctly *not* doing equity; and the plea for reformation, of course, sounds in equity. Moreover, as will appear in our discussion of insurability, an applicant is under a legal compulsion to divulge such things as these.

The maxim of "he who seeks equity must himself do equity" is, of course, so thoroughly establised in the law of every jurisdiction as hardly to need citation of authority, although perhaps it would not be amiss to mention here the recent case of *Savings Bank of New London* v. *Santaniello,* 130 Conn. 206, 210-211, 33 Atl. (2) 126 (1943), where the validity of the maxim was again recognized. The companion "clean hands" maxim seems applicable here, too; and its vitality will be attested by the comparatively recent case of *Boretz* v. *Segar,* 124 Conn. 320, 323-324, 199 Atl. 548 (1938).

II.

The petitioner entered into no contract of life insurance with Gaunt; and the Circuit Court of Appeals, in holding that it did, did so arbitrarily and in disregard of fact and applicable local law.

Judgment for the respondent was legally impossible except as the Circuit Court of Appeals, acting as if it were an arm of Connecticut's Supreme Court of Errors, could resolve not only the issue of reformation (constituting her first two points of appeal) and, *also, each* of the three issues relating to formation of contract, discussed below under subheadings 1, 2 and 3, for her. To Issue 2 alone, however, does the court's opinion direct itself—and then only as to Condition "B" of application and receipt, quite omitting mention of Conditions "H" and "F" (*supra*, p. 5). As with the issue of reformation, discussed under Topic I above, the court cannot be said to have resolved Issues 1 and 3 at all except in some sense of default implicit in the judgment it entered for the respondent since they get no legal treatment in the opinion despite the fact that, with citation to record and authorities, they were fully argued.

1. The Bases of Contract, Except for an Offer by Gaunt, Were Totally Absent.

The majority of the Circuit Court of Appeals (for Judge Clark, despite his "concurring" opinion, in effect dissented) could never have arrived where it did had it abandoned generality for a concrete delineation of the contractual liability it imposed upon the petitioner. One will notice in reading the opinion a singular absence of the spelling out process which, had it been undertaken, must have led to a judgment for the petitioner under the law of Connecticut or that of any other jurisdiction. This law is so elementary, well-established and sound as to need no citation except perhaps, to some extent, as it has

been applied in the life insurance field. [Perhaps it should be remarked in passing that, under Connecticut law as shown by the *Best* case (*infra*, p. 25) and *Supreme Colony* v. *Towne*, 87 Conn. 644, 647, 89 Atl. 264 (1914), a contract arises in the state wherein occurs the last act necessary to render it complete and effective.]

Where, then, are the bases, the universally acknowledged requisites, of contract?

The offer, we know, was Gaunt's application, a fact unchanged by the circumstance that it was on a form prepared by the petitioner and was accompanied by a premium advance.

> *Swentusky* v. *Prudential Insurance Company*, 116 Conn. 526, 534-536, 165 Atl. 686 (1933);
>
> *Rogers* v. *Charter Oak Life Insurance Company*, 41 Conn. 97 (1874), [cited approvingly in *Piscitello* v. *Boscarello*, 113 Conn. 128, 130, 154 Atl. 168 (1931)];
>
> *Allen* v. *Massachusetts Mutual Accident Association*, 167 Mass. 18, 44 N. E. 1053 (1896) [opinion by Holmes, *J.*];
>
> *Marks* v. *Hope Mutual Life Insurance Company*, 117 Mass. 528 (1875);
>
> *Metropolitan Life Insurance Company* v. *Cohen*, 96 Fed. (2) 66 (C. C. A. 2, 1938).

Cases like the above holding to the same effect either directly or by necessary implication are legion. These listed cases and numerous others were cited to the Circuit Court of Appeals; but, as is evident, they went unheeded. Those cited, including one from the Circuit Court of Appeals itself as will have been noticed, plainly suffice as to the applicable local law.

In the *Swentusky* case, the Connecticut Supreme Court of Errors (by Maltbie, *C. J.*) held that, at most, an advance of premium money by the applicant *might* put the insurance company under an implied contractual duty to act upon the application within a reasonable time, it

making no difference that otherwise he received *no* benefits from such advance (116 Conn. 531); although in the case at bar, of course, distinct benefits, though contingent on approval, would have resulted from premium advance had completion of Part B been the designated effective date.

The *Swentusky* case is also notable for this statement:

> "We must dismiss as lacking legal foundation the contention that insurance companies are so charged with a public interest as to impose upon them a peculiar duty to protect the interests of those who apply to them for insurance. An insurance company does indeed, as does every corporation, enjoy a franchise from the State, and it is subject to unusual oversight by the State in the conduct of its business. But to hold that, because of these facts alone, there are imposed upon it duties or liabilities having no sanction in the established principles of law or in the statutes governing the insurance business, would be to open a field of legal liability the limits of which we cannot encompass, and which would go far to introduce chaos in the entire business of insurance, indeed, would almost necessarily reach out into the field of other specially chartered corporations occupying not dissimilar relations to the public, as banks, utility companies, and the like. Public interest more requires that stability of the insurance business which is necessary to guard the great body of persons who enter into relations with it for their own protection and that of those dependent upon them, than it does that certain individuals should be saved the loss which may result by adherence to established legal principles."

Another Connecticut case illustrative of that state's law on the subject of offer, in conjunction with the payment of a sum of money by the offeror, is *Alfred M. Best Co.,*

Inc. v. *Goldstein,* 124 Conn. 597, 1 Atl. (2) 140 (1938). In that case the plaintiff corporation, a nonresident, solicited contracts in Connecticut through a travelling salesman. Although both the defendant and the company's representative signed company forms of contract in Connecticut, the latter marking it "Approved" and leaving a duplicate thereof with the former, the originals were forwarded to the home office in New York for acceptance. In the contract form, the company reserved the right "to reject any contract upon refund of the amount paid therefor, or to discontinue the same . . ." New York was held to be the place of contracting. *Inter alia,* the Court said:

> "The signing of the agreement (by both prospect and agent) was no more than an offer which ripened into a contract only when approved by the company. *Had the defendant paid the agreed price, this would have been merely an incident to the offer.*" (p. 602; parenthetical clause and italics ours.)

It should perhaps be observed that an offer remains an *offer* until accepted, no matter how inartistic, confusing, ambiguous, repugnant or unconscionable may be its terms and that this truth is in no way altered by the fact that the terms thereof are set forth by the offeree on one of its forms. And conditional offers in Connecticut, as illustrated by this *Best* case, and by the *Swentusky* and *Francis* cases (see *infra,* pp. 30, 31), are valid.

Turning, then, to the other essential elements of contract, where were they in the case at bar?

The offer (*i. e.,* the application) was directed to the petitioner at its home office in Boston and, if accepted, was to become a part of the policy contract. No such acceptance occurred. Instead the offeror died. At common law in all jurisdictions an offer expires with the offeror. In this case, the offeror Gaunt, by the terms of the application, was specifically warned that, assuming

he died before the approval (if any) of the petitioner, the offer would expire.

Where is the requisite meeting of minds? There was no acceptance of the application by the petitioner; and, moreover, the petitioner had before it an application substantially differing (on account of choice of effective date) from the one which the applicant intended. [If, as we have submitted (*supra*, pp. 18-22), he was bound by what was written, the respondent is out of court on her counsel's own admission.]

Where is there mutuality of obligation? If the petitioner was in some way bound, surely it was necessary for the applicant also to be bound. But, as the unchallenged finding shows, he was at liberty at any time, prior to acceptance of his application, to withdraw it and receive back the premium money he had advanced.

What were the terms, exactly, of the "contract of temporary insurance" allegedly made in Connecticut? [Of course, under the court's ruling, it was not a contract of temporary but of permanent insurance which arose if the petitioner was liable because, whether Gaunt lived or died, it was held bound to accept the application.] We have never received a real answer to that question; but this seems an appropriate point to observe that, under Connecticut statutory law (duly cited to, but passed over without comment by, the Circuit Court of Appeals), such a contract could not have arisen. Before quoting this statute, we would ask this Court to remember that the forms of application and temporary receipt in issue, and also the form of policy which would have been issued had the application been approved, were at all times on file with Connecticut's Insurance Commissioner; that the application, had it been accepted, would have become *a part* of the contract of insurance and that the soliciting agent was severely limited to solicitation only, both by the terms of his employment, as clearly set forth in the application, and by the restrictions imposed upon

him by the statutes of Connecticut. Our reference then is to Section 4182 of the General Statutes of Connecticut (Revision of 1930), the text of which reads as follows:

> "No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; *nor shall any such company or any agent, subagent, broker or other person make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon.*" (Italics supplied.)

2. The Circuit Court of Appeals, in Construing the Language of Application and Receipt, Misapprehended and Failed to Follow the Controlling Authorities.

Four judges have passed upon the construction of the language of Condition "B" of the application, as repeated virtually verbatim in the temporary receipt. The result is a two to two division. His Honor, Judge J. Joseph Smith, more learned in the controlling law of Connecticut than any of the other three judges, held that an ordinarily intelligent layman (and Gaunt was all of that), "having read the two 'if' clauses" contained in both application and receipt, could not have expected himself to be protected against the hazard of death if he died before date of approval of that application and that, in any event, the approval-before-death clause was valid. Judge Clark, whose acquaintance with Connecticut law is also wide, agreed with Judge Smith. Judges Learned Hand and Augustus N. Hand, whose conclusions became the judgment of the Circuit Court of Appeals, held otherwise and

did so under a very great misapprehension as to the state of the controlling authorities, or which, anyway, they shouldered aside.

With all due deference, we believe that the opinion of the majority fails to disclose any truly serious attempt upon its part to sit as if it were an arm of Supreme Court of Errors of the State of Connecticut with a view to ascertaining and applying Connecticut judicial and statutory law within the requirements of such cases as *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64 (1938); *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202 (1938); *West* v. *A. T. & T. Co.,* 311 U. S. 223 (1940), which imposed a duty of making ascertainment of the applicable state law "from all the available data" (p. 237), and *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 109 (1945).

The majority even disregarded what we submit is the unanimous weight of general authority although, as is well known, any appellate court will, in absence of some very compelling reason to the contrary, follow the weight of authority. This is particularly true where that weight is represented by courts of distinction, as in the instant case. We cannot escape a feeling that the majority of the Circuit Court of Appeals chose to consider this case, on the sole issue of construction it singled out for attention, as virtually one of first impression and to decide as it thought ought to be the law.

Following the weight of authority, in absence of compelling reason for not doing so, is not only practiced by the Connecticut Supreme Court of Errors, as by other appellate courts, but such is Connecticut law, as illustrated by clear implication at least, in the very recent case of *Wehrhane* v. *Peyton,* 133 Conn. 478, 500-501, Atl. (1947). *O'Connor* v. *Metropolitan Life Insurance Company,* 121 Conn. 599, 607-609, 186 Atl. 564 (1936), is an insurance case showing Connecticut's practice in this regard.

It was wholly unreasonable, negligent and arbitrary for the Circuit Court of Appeals to hold in the light of the authorities we shall cite below that the approval-before-death and the sixty-day clauses of application and receipt (*supra*, p. 5) would have been, or would likely have been, ruled as null and void by the Connecticut Supreme Court of Errors. There is every reason to believe the opposite; and the burden of proof, after all, was on the respondent. [The sixty-day clauses go unmentioned in the Court's opinion; but, by the necessary force of its judgment, they also are ruled invalid.] The authorities we speak of are these:

Conn. G. S. (1930), §4182 (quoted *supra*, p. 28);

Swentusky v. *Prudential Insurance Company of America, supra*, 116 Conn. 526, 165 Atl. 686 (1933);

Kelly v. *John Hancock Mutual Life Insurance Company, supra*, 131 Conn. 106, 38 Atl. (2) 176 (1944);

Russo v. *Metropolitan Life Insurance Company*, 125 Conn. 132, 3 Atl. (2) 844 (1939);

Braman, et ux. v. *Mutual Life Insurance Company of New York*, 73 Fed. (2) 391 (C. C. A. 8, 1934);

Winslow v. *Mutual Life Insurance Company of New York*, 93 Fed. (2) 802 (C. C. A. 9, 1938);

McCampbell v. *New York Life Insurance Company*, 288 Fed. 465 (C. C. A. 5, 1923);

Ivie v. *International Life Insurance Company*, 217 Ala. 559, 117 So. 176 (1928);

Whitney v. *Union Central Life Insurance Company*, 47 Fed. (2) 861, 864-6 (C. C. A. 8, 1931);

Shira v. *New York Life Insurance Company*, 90 Fed. (2) 953 (C. C. A. 10, 1937);

Arcuri v. *Prudential Insurance Company of America*, 290 N. Y. S. 567, 248 App. Div. 501 (1936) [cited with approval in *Metropolitan Life Insur-*

ance Company v. *Cohen*, 96 Fed. (2) 66, 68 (C. C. A. 2, 1938)];

Corning v. *Prudential Insurance Company of America*, 288 N. Y. S. 661, 248 App. Div. 187 (1936); affirmed 273 N. Y. 668, 8 N. E. (2) 338 (1937);

Hughes v. *John Hancock Mutual Life Insurance Company*, 297 N. Y. S. 116, 163 Misc. 31 (Municipal Court, 1937); judgment, as modified by the Appellate Term, affirmed, without opinion, 3 N. Y. S. (2) 899, 254 App. Div. 570 (1938);

Goldstein v. *New York Life Insurance Company*, 162 N. Y. S. 1088, 176 App. Div. 813 (1917); affirmed 227 N. Y. 575, 124 N. E. 898 (1919);

Martin v. *Equitable Life Assurance Society*, 58 N. Y. S. (2) 845 (Supreme Court, Special Term, 1945).

See also:

John Hancock Mutual Life Insurance Company v. *McClure*, 218 Fed. 597 (C. C. A. 3, 1914); and

Giddings v. *Insurance Company*, 102 U. S. 108 (1880), which was cited approvingly in *Francis* v. *Deming*, 59 Conn. 108, 112, 21 Atl. 1006 (1890).

The Connecticut decisions cited in this formidable listing are put there because they, particularly the *Swentusky* case which involved an approval condition, taken along with other Connecticut decisions cited in this brief, point clearly to the result which its Supreme Court of Errors would have reached, *i. e.*, sanction of the approval-before-death and sixty-day clauses, had the facts of the case at bar been before it. [That would seem to be the reason why the respondent, a citizen of Connecticut, brought her action in a Federal court.] The other cases are squarely in point on the exact point at issue, namely: whether or not, given an application providing for an

effective date of insurance which antedates the date of approval, should the applicant prove to be insurable, and given also an advance of premium with such application, an approval-before-death condition or an equivalent thereof is valid? These cases, stressed to the Circuit Court of Appeals as ones declarative of sound and well-established law, those under "see also" excepted, go unmentioned in its opinion, except for some from New York. Aware, however, that there were "unquestionably decisions which excuse the insurer", it cites but three, one from Washington (by way of a *dictum*), one from Arkansas and one from Utah [12 Life Cases (C. C. H.) 425], as follows:

**Starr* v. *Mutual Life Insurance Company*, 41 Wash. 228, 83 Pac. 116 (1905);

Cooksey v. *Mutual Life Insurance Company*, 73 Ark. 117, 83 S. W. 317 (1904);

Field v. *Missouri State Life Ins. Co.*, 77 Utah 45, 290 Pac. 979 (1930).

*[Though not cited by the court, see also, on the general Washington attitude, *Basinsky* v. *National Casualty Company*, 122 Wash. 1, 209 Pac. 1077 (1922)].

Why just *these* cases? Why no mention of the more weighty and, generally speaking, much more recent cases cited to the court by the petitioner? The net effect is to create a highly misleading impression about the state of the authorities favorable to the petitioner. In this connection, the court undertakes to cite two other decisions favorable to the petitioner's viewpoint, one from this Court and one from the Supreme Court of Kentucky, but which, quite unconvincingly we think, it seeks to explain away [12 Life Cases 425], namely:

Insurance Company v. *Young's Administrator*, 23 Wall. 85 (1874);

Northwestern Mutual Life Insurance Company v. *Neafus*, 145 Ky. 563, 140 S. W. 1026 (1911).

The majority of the court then went on to say: "The law of New York is in doubt." However, as Judge Clark recognized in his "concurring" opinion, such is simply not the case,—not, anyway, unless one can say that several cases exactly in point, and decided for the insurance companies involved, two of them affirmed by the Court of Appeals (one of which was the comparatively recent, and leading, *Corning* case, *supra*, p. 31), leave New York law in doubt because that law has not been expressed by a formal opinion of its Court of Appeals! By what line of reasoning the majority could then go on wholly to dismiss the holdings in those decisions and emerge with a judgment *for* the respondent (who had the burden of proof), we can hardly conjecture, except to say that, having decided it would like to rule for the respondent, whose misfortune undoubtedly excited its sympathy (as it would the sympathy of anyone), it proceeded to do so by a *tour de force*.

Hart v. *Travelers Insurance Company*, 258 N. Y. S. 711, 236 App. Div. 309, affirmed 261 N. Y. 563, 185 N. E. 739 (1932), and *Buono* v. *Prudential Insurance Company of America*, 267 N. Y. S. 972, 240 App. Div. 898 (1933), based entirely on the authority of the former, are indeed two cases which, *standing alone*, would point against (though in no decisive sense) the petitioner's position. But the subsequently decided *Arcuri*, *Corning*, *Hughes* and *Martin* decisions (*supra*, pp. 30-31) narrow the *Hart* and *Buono* decisions to the point, we believe, of actual repudiation; but, repudiated or not, they narrow them so that they distinctly and expressly fall outside the issue at hand, which issue is resolved for the insurance company in each instance.

The majority opinion undertook to cite some cases outside of New York which, it said, were cases upholding the respondent's position [12 Life Cases 426]. Their defect is that they are not in point; for a court cannot be said to have decided that an approval-before-death condi-

tion, or its equivalent, in an application designed to confer the benefits of predating, would be invalid when no such condition in fact was embodied in application and receipt.

Stonsz v. *Equitable Life Insurance Co.*, 324 Pa. 97, 187 Atl. 403 (1936), seems nearest but it does not strike the mark of true equivalence or relevance as study quickly reveals; and, *inter alia*, there was no condition specifying approval before death (or some other time).

In *Duncan* v. *John Hancock Mutual Life Insurance Company*, 137 Ohio St. 441, 31 N. E. (2) 88 (1940), stressed by the lower court and the respondent, the application *specifically* provided for insurance coverage should the applicant die prior to date of issue of policy (a fact much stressed by the Ohioan court). Significantly enough, in *Leube* v. *Prudential Ins. Co. of America*, Ohio St. , 72 N. E. (2) 76, 78-9 (February 28, 1947), which admittedly is not an "all fours" decision on the exact issue now at hand, the Supreme Court of Ohio cited and approvingly discussed New York's *Corning* case (*supra*, p. 31).

In view of the foregoing, we believe it is probably correct to say that, *given facts substantially similar or fairly analogous to those at bar, the authorities have unanimously held for the insurance company.*

Division in the Court; the Majority's Doubts.

The "concurring" opinion of Judge Clark, as has already been observed, was an out-and-out dissent to the majority's opinion on the issue of validity of the approval-before-death clauses now under discussion [12 Life Cases 426-7]. More than this, it clearly should have been a dissenting not a concurring opinion because the concurrence was based on a ground which could not conceivably be accorded legal recognition, *i. e.*, "that the course of nego-

tiations required and controlled by the insurance company was 'unpardonable' ". In the first place, Judge Clark does not, nor could he, point to any unpardonable conduct upon the petitioner's part since the Findings show none; and, in the second place, "unpardonable conduct" as such has no recognition in law as a basis upon which to predicate liability.

It seems more than possible that by "unpardonable" conduct, Judge Clark was thinking that the petitioner had unpardonably (*i. e.*, unreasonably) delayed reaching a decision on the application before it,—an idea which appears to have influenced the thinking of the majority. If so, what all three judges overlooked is the fact that an issue of unreasonable delay *was* before the District Court and that that court resolved it in the petitioner's favor, a ruling which was not questioned in the respondent's appeal.

While the two judges best acquainted with Connecticut law (Judge Clark and District Judge Smith) unhesitatingly decided that the approval-before-death clause of application and receipt would be held valid and binding by Connecticut courts, it is important to notice that Judges Learned Hand and Augustus N. Hand, in addition to being vague about the anatomy of the alleged insurance contract and under a misapprehension about the state of the authorities, gave every evidence of believing themselves to be on soft ground.

Nowhere do these judges, by their majority opinion, say that the language of the disputed clause is ambiguous, or unclear in phraseology. The opinion admits that it "does indeed some violence to the words not to make actual 'approval' always a condition" *i. e.*, approval before death, but claims that "it does greater violence to make the insurance 'in force' only from the date of 'approval' " [12 Life Cases 424]. [If issued, of course, the policy is in force not on the date of approval but *as of* an earlier date. In other words, it is predated, carrying the admitted benefits thereof. Predating, as the authorities already cited show, is a common practice. But to predate a policy is *not* auto-

matically to say that it stands for all purposes precisely as if it had been *issued* on the predate.]

Then again, overlooking the clear mandate for the petitioner implicit in its words, the majority says this:

> "It is true that if the clause as a whole be read literally, the insured was not covered if he died after 'completion of Part B', but before 'approval'" [12 Life Cases 424].

Still again, the majority, plainly unsure of itself despite its misapprehension about the state of the authorities, says this:

> "Thus upon a preponderance of the decided cases the answer is in doubt, and we cannot be sure how a Connecticut court would decide for the point has never come up in that state. Unaided as we are (!), we rest our decision upon the reasons which we have tried to set forth" [12 Life Cases 426; exclamation point ours].

The truth appears to be, or so we feel as we read the opinion, that the majority found the laws of Connecticut, including what would be the views of her judiciary in the instant case, like unto so many annoying flies from the provinces which should be despatched with a minimum of effort. Perhaps the best evidence for the validity of this feeling will be supplied to one who, in connection with reading the court's opinion, asks himself this question: could one conceive *that* opinion, or anything substantially like it, being handed down by the Supreme Court of Errors of Connecticut?

Rules of Construction.

The Circuit Court of Appeals failed to follow those basic rules of construction which apply in Connecticut, with unusual strictness as was pointed out, and, in fact, in most if not all jurisdictions. Connecticut, indeed, goes

so far as to say that the "construction and legal effect of a contract 'cannot be changed or varied by reason of its inconvenience to the parties, or the unreasonableness of the terms'" (see case next cited). It does not differentiate between insurance and other contracts. [*Miller Brothers Construction Company* v. *Maryland Casualty Company,* 113 Conn. 504, 513, 155 Atl. 709 (1931)] Many of the cases already cited, of course, deal with problems in construction; but, at this point, with the observation that an instrument should always be construed as an integrated whole (and *a fortiori* the clauses of one integrated sentence such as Condition "B" of application and receipt), every effort being made to give every part effect, we simply cite these as illustrative of the court's failure to follow the authorities and above all, of course, Connecticut decisions.

Whitaker v. *Cannon Mills Company,* 132 Conn. 434, 440, 45 Atl. (2) 120 (1945);

Porto v. *Metropolitan Life Insurance Company,* 120 Conn. 196, 200, 180 Atl. 289 (1935);

Standard Fur Cutting Co. v. *Caledonian Insurance Company,* 113 Conn. 108, 112-113, 154 Atl. 153 (1931);

Eastern Bridge & Structural Co. v. *Curtis Building Co.,* 89 Conn. 571, 576, 94 Atl. 921 (1915);

Williams v. *Union Central Life Insurance Company,* 291 U. S. 170, 180 (1933);

Carpenter v. *Continental Casualty Company,* 95 Fed. (2) 634, 639 (C. C. A. 8, 1938);

Equitable Life Assurance Society of the United States v. *Deem,* 91 Fed. (2) 569, 575 (C. C. A. 4, 1937);

Rocci v. *Massachusetts Accident Company,* 222 Mass. 336, 343, 110 N. E. 972 (1916);

New York Life Insurance Company v. *Veit, et al.,* 294 N. Y. 222, 227, 62 N. E. (2) 45 (1945).

The *Williams* case, decided by this Court, is perhaps of some added interest here in view of the lower court's

claim that the petitioner, by virtue of Condition "B" (*supra,* p. 5) [no mention being made of Conditions "H" and "F" (*supra,* p. 5)], sought to impose upon words an "esoteric significance", intelligible only to the craft of insurers! (12 Life Cases, p. 424). Condition "B" is, compared with many an insurance clause, simplicity itself; nor is it claimed that the two provisos of this particular clause were not clearly put.

In the *Standard Fur Cutting* case, the Connecticut Supreme Court of Errors, in speaking of the general rule which favors an assured where a real ambiguity is present, said that it *"cannot be invoked to change the nature of the contract or nullify the insured's express and unequivocal agreement"* (p. 113; italics supplied).

In the *Eastern Bridge & Structural Co.* case, the same court said (p. 576) that construction of the whole instrument is requisite and also:

> "Where two clauses which are apparently inconsistent may be reconciled by any reasonable construction, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent and repugnant provisions."

3. Insurability of the Applicant Under the Petitioner's Rules Was Not Established by the Respondent.

It cannot possibly be said that the applicant was insurable under the petitioner's rules and that, but for his death, he would have received a policy "for the amount and on the plan applied for without modification" since, as appears from unchallenged facts found by the District Court, the respondent did not discharge her burden of proof.

This is true if for no other reason than her failure to show that Lincoln, the petitioner's reinsurer, would have reinsured for $5000, principal sum, and "on the plan applied for without modification", had it ever had the ap-

plication referred to it—which, as found, it never did. Yet *under the petitioner's rules,* compliance with all of which was a prerequisite to liability under Condition B (*supra,* p. 5) even as it was rewritten by the Circuit Court of Appeals, no policy "for the amount and on the plan applied for without modification" (and anything less would have been a legal rejection of the application) would have been issued by it in absence of such an approval by Lincoln.

The facts relating to insurability and the question of reinsurance, stated *supra* at pages 6-8, to which reference is respectfully made, need no repetition here. The applicant's conduct subsequent to execution of the application, as already pointed out, is pertinent on the subject not only of reformation but of insurability as well. The facts on that conduct, to which reference is also respectfully made, appear *supra* at pages 4, 7, 21-22.

The Circuit Court of Appeals arbitrarily disregarded these record facts on insurability. It also arbitrarily disregarded authorities cited to it on the effect of an applicant's rendering himself uninsurable subsequent to his signing an application, which Connecticut would doubtless follow, and which are these:

Stipcich v. *Metropolitan Life Insurance Company,* 277 U. S. 311, 315-318 (1928);

Gabbett v. *Connecticut General Life Insurance Company,* 303 Mass. 433, 435-437 (1939);

Goldstein v. *New York Life Insurance Company,* 162 N. Y. S. 1088, 176 App. Div. 813 (1917), aff. 227 N. Y. 575, 124 N. E. 898 (1919);

Polachek v. *New York Life Insurance Company,* 263 N. Y. S. 230 (1933), aff. 268 N. Y. S. 995 (1934);

Harris v. *Security Mutual Life Insurance Company,* 130 Tenn. 325, 170 S. W. 474 (1914).

CONCLUSION.

In view of the foregoing considerations, it is respectfully submitted that this Court grant the writ of certiorari prayed in the petition to which this brief is annexed.

Respectfully submitted,

WALLACE W. BROWN,
Attorney for Petitioner.

Hartford, Connecticut,
May 16, 1947.

APPENDIX.

Relevant Clauses of Application;
Also Temporary Receipt in Full

The text of the relevant clauses in the application, described on page 5 of the petition, *supra,* is as follows:

> "IT IS UNDERSTOOD AND AGREED THAT: . . . B. If the first premium or installment thereof above stated was paid when this application was signed, and if the Company is satisfied that on the date of the completion of Part B of this application I was insurable in accordance with the Company's rules for the amount and on the plan applied for without modification, and if this application, including said Part B, is, prior to my death, approved by the Company at its Home Office, the insurance applied for shall be in force as of the date of completion of said Part B, but, if this application so provides, such insurance shall be in force as of the date of issue of the policy. . . . F. The Company reserves the right to require other evidence of insurability satisfactory to it, in addition to the information contained in this application. . . . H. If within sixty days from the date of Part B of this application it is not approved as aforesaid, or if the Company does not give notice of action thereon, the application shall be deemed to have been declined."

The temporary receipt, also described on page 5 of the petition, is as follows:

> "THIS FORM IS A TEMPORARY RECEIPT AUTHORIZED BY THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON, MASS., FOR PREPAYMENT OF THE FIRST PREMIUM WITH APPLICATION FOR NEW INSURANCE AND IS TO BE SURRENDERED IN EXCHANGE FOR THE OFFICIAL RECEIPT.

Received from JAMES A. GAUNT, JR. who has this day signed an application to the JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY for a policy of insurance on his (or her) life for $15,000 on the END AGE 85 Plan, the sum of SEVENTY-NINE 05/100 Dollars, being the amount of the first QUARTERLY premium on such policy; in consideration whereof it is understood and agreed that if the Company is satisfied that on the date of the completion of Part B of said application, the applicant was insurable in accordance with the Company's rules for the amount and on the plan applied for without modification, and if said application, including said Part B, is, prior to the applicant's death, approved by the Company at its Home Office, the insurance applied for shall be in force as of the date of completion of said Part B, but if said application so provides, such insurance shall be in force as of the date of issue of the policy. If within sixty days from the date of Part B of said application it is not approved as aforesaid, or if the Company does not give notice of action thereon, the premium so paid will be returned upon the surrender of this receipt.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
By M. KELMAN Agent

DATED AT 8/3/43 19
Form 156A-O-39."

Supreme Court

JOHN HANCOCK [illegible]
Collector,

Appellant,

vs.

RHODA S. GAUNT, individually and as [illegible]
of the Estate of James A. Gaunt, [illegible]

Appellee.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF RHODA S. GAUNT IN OPPOSITION

HUGH M. ALCORN,
JOHN P. HODGSON,
MILTON H. MEYERS,
Counsel for Respondent.

The Court Press, 120 Cedar Street, N. Y. C.

INDEX.

		PAGE
I.	Opinions Below	1
II.	Jurisdiction	2
III.	Statement	2
IV.	Summary of Argument	8
V.	A. In the light of the facts found, Connecticut law as well as the law of other jurisdictions required reformation of the contract	8
	The Law on Reformation	10
	B. There are no Connecticut decisions which are controlling with respect to the construction of the specific type of life insurance contract involved in this case	14
	C. Decisions closely in point in other jurisdictions as well as long-accepted principles of law as enunciated by Connecticut courts and in all other states overwhelmingly support the decision of the Circuit Court of Appeals	16
	1. Provisions making insurance effective on the date of the application or medical examination if the application has been "accepted" or "approved" at the home office	21
	2. Provisions making the insurance effective as of the date of the application or medical examination provided the applicant was, on such date, an insurable risk according to the company's standards	25

PAGE

3. The John Hancock forms of application and binding receipt 27

The Law Re Ambiguities and Repugnancies 32

(a) A construction adopted by the parties 38

(b) Construction by the insurer's agent 39

(c) Legal effect determined by reference to prior judicial construction 40

The Trial Court's Decision 41

Insurability 46

VI. Conclusion 47

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Adams v. *Turner*, 73 Conn. 38, 46, Atl. 247 (1900)... 37

Albers v. *Security Mutual Life Insurance Co.*, 41 S. D. 270, 170 N. W. 159 (1918) 26

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American National Insurance Co. of Galveston, Texas v. *Belch*, 100 F. (2d) 48 (C. C. A. Va. 1938)..... 15

Arcuri v. *Prudential Insurance Company of America*, 290 N. Y. S. 567, 248 App. Div. 501 (1936) 23

Armstrong v. *Western Manufacturers Mutual Insurance Co.*, 95 Mich. 137, 54 N. W. 637 (1893)..... 14

Back v. *Peoples National Fire Insurance Co.*, 97 Conn. 336, 116 Atl. 603 (1922) 10

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PAGE

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Brady v. *Bankers Casualty Co. of Minneapolis*, 114 Kans. 865, 220 P. 1033 (1923) 40

Buono v. *Prudential Insurance Company of America*, 267 N. Y. S. 972, 240 App. Div. 898 (1933) 22, 23

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Duncan v. *John Hancock Mutual Life Insurance Company*, 137 Ohio St. 441, 31 N. E. (2d) 88 (1940) 24, 29, 30, 31, 40

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Fokes v. *Interstate Life & Accident Ins. Co.*, 59 Ga. App. 680, 2 S. E. (2d) 170 (1939) 44

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PAGE

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Illinois Bankers Life Ass'n. v. *Palmer,* 176 Okla. 514, 56 P. (2d) 370 (1935) 26

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National Equity Life Ins. Co. v. *Bourland,* 179 Ark. 398, 16 S. W. (2d) 6 (1929) 43

New Britain Real Estate & Title Co. v. *Hartford Acceptance Corporation,* 112 Conn. 613, 153 Atl. 658 (1931) 37

PAGE

New England Mutual Life Insurance Co. v. *Mitchell*, 118 F. (2d) 414 (C. C. A. Va. 1941), cert. denied 62 S. Court 60, 314 U. S. 629, 86 L. Ed. 505 (1941) 15

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Starr v. *Mutual Life Insurance Company of N. Y.* (Wash.), 83 Pac. 116 (1905) 23, 24

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Sussex v. *Aetna Life Assurance Co.*, 33 D. L. R. 549, 38 Ont. 365 27

PAGE

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Town of Enfield v. *Clark L. Hamilton, et al.,* 110 Conn. 319, 148 Atl. 353 (1930) 11, 12

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Volume 6, page 4991 10

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PAGE

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Restatement, Contracts, Section 265 26

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Page 201 36
Pages 418-419 40
Page 451 12
Page 689 35

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Section 44 26
Section 675A 26
Section 1547 10

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3 C. J. S. 1037 35

13 C. J. 535, 536; 1152-1155 37

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Page 158, Section 143 17
Section 166 37
Page 187 36
Page 255 11

31 C. J. S. 341, 345, 346 .....11, 12

33 C. J. 115 37

PAGE

44 C. J. S., Insurance:
Pages 956, et seq. 17
Page 1053 14
Page 1139 ..... 32, 39
Page 1154 41
Pages 1179-1180 ..... 35, 36
Pages 1180-1183 ..... 36, 37

53 C. J., Reformation of Instruments, Section 27 10

153 A. L. R. 794, 801 (Annotation) 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1386.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

—against—

RHODA S. GAUNT, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RHODA S. GAUNT IN OPPOSITION.

I.

Opinions Below.

The opinion of the District Court, dated April 17, 1946, and a supplement thereto, dated July 23, 1946, have not been published in the Federal Supplement. Nor, as of this date, has the opinion of the Circuit Court of Appeals, rendered March 31, 1947, been published in the Federal Reports. However, as indicated in the petitioner's brief, all of these opinions have been published in C. C. H. Life Cases and all of them appear in the Record certified by the Clerk of the Circuit Court of Appeals.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a) as amended, U. S. C., Title 28, Section 347; 28 U. S. C. A., Section 347.

III.

Statement.

The respondent is the mother of the decedent, James A. Gaunt, Jr., and the duly appointed administratrix of his estate. At the time of instituting this action on May 31, 1944 she was, and for many years prior thereto had been, a resident of Waterbury, Connecticut, where she resided with her husband and children.

The petitioner is a Massachusetts corporation which is engaged in the life insurance business and which had, for many years prior to the institution of this suit, maintained an agency or district office in Waterbury, Connecticut, where it employed various persons, including one Morris Kelman, as life insurance salesman.

During the summer of 1943, the decedent, James A. Gaunt, Jr., was an employee of the French Manufacturing Company in Waterbury. He was then twenty-one years old, insuring age twenty-two, having been born on December 9, 1921.

James was contacted on two occasions in July, 1943 by the aforesaid Morris Kelman, agent of the petitioner, who did his best to sell a life insurance policy in substantial amount to the boy. Kelman recommended three policies of insurance, two of which were in the face amount of $15,000, one of the latter being designated by the petitioner as a "$15,000 Endowment at 85". At the same

time James was giving serious consideration to proposals of an agent of the Metropolitan Life Insurance Company who was also making efforts to sell him a $15,000 policy.

The negotiations between James and the two agents were suspended temporarily while James took a short vacation. However, during this vacation he discussed with his mother the various proposals of the two agents and it was tentatively decided, subject to a proposed further conference with Kelman, that he would apply to the petitioner for the so-called "$15,000 Endowment at 85" policy.

Accordingly, on August 3, 1943, the agent Kelman again appeared at the Gaunt home and a further discussion about the proposed insurance was had during which Kelman advised the applicant that it would be best for him to pay in advance the first quarterly premium which, including the additional premium for accidental death benefits, amounted to $79.05. In advocating this advance payment Kelman advised the applicant that he would benefit thereby in that, if he were insurable, his insurance would run from the date of the medical examination, which, it was proposed, would be made that afternoon. Kelman further advised the applicant that if he did not pay his first premium in advance the insurance would not start to run until the delivery of the policy.

James listened to the agent and, as the result of their discussion, he cut off his negotiations with the Metropolitan Life Insurance Company, agreed to apply to the petitioner for its "$15,000 Endowment at 85" policy, with additional accidental death benefit provision, and further agreed to pay the first quarterly premium of $79.05 in advance, *i. e.*, that very day.

James and the agent Kelman then left the Gaunt house and went to a local bank where the required sum of $79.05 was paid to the agent by James and, after Kelman had written in answers to various questions put to the applicant on the petitioner's standard form of application blank, James wrote his signature in the space pro-

vided on the blank for that purpose. In return, Kelman handed him an instrument designated "Temporary Receipt" which is referred to in the petitioner's agency manual and other literature as a "Binding Receipt". The respondent was designated in said application as the beneficiary of the life insurance applied for.

This application form contained a question the answer to which was of the greatest importance to the applicant. The question, designated as No. 12 on the form, requested the applicant to signify whether he elected to have his insurance effective as of the date of Part B (this being the medical examiner's form which was annexed to and formed a part of the application), or as of the date of issue of policy. When Kelman filled in the answers to the various questions on the application form, as aforesaid, he left Question 12 unanswered. According to other provisions in the application form, if this question remained unanswered the effect was to put the insurance in force as of the date of Part B.

The date of Part B, *i. e.*, August 3, 1943, was the date which both Kelman and Gaunt had determined upon as the effective date of the insurance. Nevertheless, after James had signed his name on the application, Kelman, without the applicant's knowledge and contrary to the understanding which he had reached with the applicant, inserted an answer to Question 12 in which he indicated that the applicant had elected the date of policy issue as the effective date of the insurance. Whether this inequitable act was done by Kelman at the bank or at some later time in the privacy of his own office is not known. However, the fact is that it was done, and it was done as the result of motives on the part of Kelman which are not relevant here but which were clearly disclosed by his own testimony on the trial.

After completing their business at the bank Kelman and the applicant went to the office of one of the petitioner's medical examiners in Waterbury, one Dr. Sandulli, and there the applicant was examined and given a clean

bill of health by the examiner. Dr. Sandulli filled in and executed Part B of the application that afternoon, *i. e.*, August 3rd, 1943, and the following day delivered the papers to the Waterbury agency of the petitioner. Several days later these papers were forwarded to the petitioner's home office in Boston where they were examined, along with certain other relevant papers pertaining to the applicant's insurability, by members of the petitioner's underwriting department.

A few days after his dealings with Kelman on August 3rd, James decided to give up his job in Waterbury and to go to the Pacific Coast. Accordingly, he left his employment on August 15th and on August 19th started for the West Coast by bus. Prior to leaving Waterbury, he had notified a friend in Chicago that he would stop over to see him in that city.

After his departure the respondent received two written communications from her son, one postmarked Chicago, Illinois, and the other postmarked Milwaukee, Wisconsin. Apparently all was going well, but on the early morning of August 26th she received the stunning news that her son's dead body, with a bullet wound in the head, had been found by the tracks of the Chicago, Milwaukee, St. Paul & Pacific Railroad at a point several miles west of Milbank, South Dakota.

After what we have claimed was needless and unreasonable delay in underwriting operations, the application of James A. Gaunt, Jr. finally came, on the morning of August 26th, 1943, to the desk of the petitioner's chief medical underwriter and a stamp mark, indicating his approval of the application, was placed thereon. However, shortly thereafter the petitioner learned of the applicant's death, and thereupon, and for that reason alone, ceased all activities with respect to underwriting and policy issue, and subsequently refused, on various grounds, to recognize the respondent's claim for the insurance proceeds, one of the grounds being that it had not approved of the application before the applicant's death.

As the result of the petitioner's attitude the present suit was instituted. The complaint, which was drawn in four counts, embraced two essential theories of recovery, (a) that the application and binding receipt, executed under the circumstances stated above, constituted, if the applicant were insurable, a contract of life insurance which was in full force at the time of his death, and (b) that on the basis of the facts which we were prepared to show, the petitioner was liable in tort or implied contract as the result of its negligent delay in failing to act upon the application within a reasonable time after August 3rd. On the express contract theory it was obviously proper that the suit be brought by the respondent in her individual capacity but, under the tort or implied contract theory, the majority of cases appear to require that the action be prosecuted in the name of the representative of the applicant's estate. Accordingly, because of the different theories relied upon by us for recovery, suit was brought in Mrs. Gaunt's name both individually and as administratrix of her deceased son's estate.

In its Finding of Facts the trial court made an exhaustive review of the events which occurred in the time which intervened between the signing of the application and the applicant's death, and thereupon concluded that, although there were two substantial unexplained delays totaling about ten days in the underwriting operations, the respondent had not proven that there was an overall *unreasonable* delay. Although we could not agree with this conclusion, we recognized that it was a conclusion of fact which it was within the province of the trial judge to reach and that there would be little to gain by seeking a review of the evidence on that point. Accordingly, we abandoned the tort and implied contract claims which were set forth in different forms in the Second, Third and Fourth Counts of our complaint and our client appealed to the Circuit Court of Appeals from the District Court's judgment only as it affected her rights as an

individual under the express contract claim, this claim having been set forth in the First Count.

In the Circuit Court of Appeals it was, in substance, our contention that the trial court made several serious errors of law in deciding the issue formulated under the First Count and that we were not only entitled to recover the face amount of the policy under a correct decision upon that issue, but that we were also fully entitled to recover the additional amount of the accidental death benefits plus interest on the unpaid total proceeds from the date the obligation should have been met to the date it is actually met.

Against our contention that the record failed utterly to support the District Court's finding that the petitioner had proven that a person had killed the insured, with the deliberate intention of killing him, the Circuit Court of Appeals decided that the record supported such a conclusion. Furthermore, the Circuit Court held that although the insured was never advised by Kelman that the company's standard form of accidental death provision contained numerous exceptions to the purported coverage for accidental death, including an exception denying coverage if death resulted from the intentional act of another, the beneficiary could not recover the additional $15,000 although her son's death was, in law, an accident. The appellate court did, however, rule that the contract entered into between himself and the company was a contract of life insurance which was in full force and effect at the time of his death and that therefore the respondent should recover $15,000, representing the face amount of the insurance.

IV.

Summary of Argument.

A. In the light of the facts found, Connecticut law as well as the law of other jurisdictions required reformation of the contract.

B. There are no Connecticut decisions which are controlling with respect to the construction of the specific type of life insurance contract involved in this case.

C. Decisions closely in point in other jurisdictions as well as long-accepted principles of law as enunciated by Connecticut courts and in all other states overwhelmingly support the decision of the Circuit Court of Appeals.

V.

A.

In the light of the facts found, Connecticut law as well as the law of other jurisdictions required reformation of the contract.

This issue is concerned with the all-important answer to Question 12 in the application (Record, Part I, page 40).* In that question the applicant was given the right to choose whether his insurance should go into force on the date of Part B, the medical examination, or on the date of policy issue. He could elect the date of Part B by simply inserting a checkmark in the first of the two options given

* Throughout this brief, reference to Part I of the Record means the Appendix to Brief of Appellant, reference to Part II means Appellee's Appendix and reference to Part III means the record of the proceedings in the U. S. Circuit Court of Appeals, Second Circuit.

in Question 12. Or he could accomplish the same result by checking neither of the options and simply leaving the question unanswered. This is so because Section B of that portion of the application which follows Question 18 provides that when the first premium or installment thereof is paid in advance the insurance shall be effective from the date of Part B *unless* the applicant specifically elects otherwise in answering Question 12.

An examination of the Finding and Amendments to Finding reveals the following facts:

1. When the applicant paid to the petitioner's agent Kelman the sum of $79.05, representing the first quarterly premium on the insurance, he did so upon the representation of Kelman that the insurance would be effective from the date of the medical examination if he were insurable on that date (Record, Part I, page 44, Paragraph 13).

2. Such advance payment was advantageous to the company (Record, Part I, page 44, Paragraph 14).

3. Kelman stressed the advantages of coverage from the date of medical examination and thereby obtained the advance payment of premium, but did not so mark the application as to call for coverage from the date of the medical examination (Record, Part I, page 45, Paragraph 15).

4. Both the applicant and Kelman intended that the applicant should be covered from the date of the completion of Part B of the application by the examining physician (Record, Part I, page 71, Paragraph 4).

5. Nevertheless, after the application was signed by Gaunt, Kelman marked Item 12 of the application to indicate insurance effective as of the date of issue of the policy (Record, Part I, page 45, Paragraph 15).

6. Kelman so marked Item 12 without the knowledge

or consent of Gaunt (Record, Part I, page 71, Paragraph 2).

7. The marking of Item 12 by Kelman to indicate that insurance was to be effective from the date of policy issue was due to a mutual mistake on the part of Gaunt and Kelman (Record, Part I, page 73, Paragraph 75).

The Law on Reformation.

> "Where an action arises upon an instrument which, from mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, fails to express the actual agreement, it is a matter peculiarly within the jurisdiction of a court of equity to reform such contract and grant relief in accordance with the intention of the parties * * *."
>
> *53 C. J., Reformation of Instruments,* Section 27.
>
> "Where a written agreement is not in conformity with the actual intention of the parties in a material matter, a court of equity will reform the writing in accordance with that intention if innocent parties will not be affected thereby. The jurisdiction is confined to writings, but as to them it is clear."
>
> *Williston on Contracts,* Revised Edition, Section 1547.

See

> *Couch, Cyclopedia of Insurance Law,* Volume 6, page 4991.

The rule in Connecticut is similar to that of other jurisdictions and applies to insurance contracts as well as to other written agreements.

> *Olmsted* v. *Olmsted,* 38 Conn. 309 (1871);
> *Reiner* v. *Maier,* 96 Conn. 566, 114 Atl. 657 (1921);
> *Back* v. *Peoples National Fire Insurance Co.,* 97 Conn. 336, 116 Atl. 603 (1922).

Another Connecticut case and one which is strikingly in point in the present situation is *Town of Enfield* v. *Clark L. Hamilton, et al.*, 110 Conn. 319, 148 Atl. 353 (1930).

Reformation and recovery on the reformed agreement may be had in the same action.

29 American Judisprudence, Insurance, 255.

This insurance company has, ever since the District Court's judgment was rendered, attempted to disown Kelman and, by the most devious methods, to get around the District Court's findings relative to Kelman's opprobrious conduct. Thus, we have the spectacle of this major company denying all responsibility for the acts of its agent. So, cloaked with a fake mantle of innocence, it bids for sympathy on the ground that the home office naively assumed that the contract called for insurance effective on date of policy issue. It is inconceivable that any court would thus permit a principal to so divest itself of liability for the dishonorable acts of one whom it has sent out into the public, ostensibly as an honest and qualified representative, to gather business for the principal's benefit. Not one of the cases cited by the petitioner upholds such an unthinkable proposition and the cases cited above are a direct answer to it.

In addition to the law of agency, general principles of estoppel prevent the company from successfully pressing for such an unfair advantage.

> "The doctrine of equitable estoppel precludes a person from maintaining a position or attitude inconsistent with another position or attitude which is sought to be maintained at the same time or which was asserted at a previous time, and, as a general rule, where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterward assume a position inconsistent

with such act, claim, or conduct to the prejudice of another who has acted in reliance on such conduct or representations."

31 C. J. S. 341.

Also in point on the subject of estoppel are:

Seymour Mfg. Co. v. *Derby Mfg. Co.*, 94 Conn. 311, 109 Atl. 395 (1920);
Gagner v. *Petrauskas*, 112 Conn. 307, 152 Atl. 145 (1930);
31 C. J. S. 345, 346;
Vance on Insurance, Second Edition, page 451.

A famous case which concerned facts precisely analogous to these and which resulted in an outright repudiation of the insurer's efforts to divorce itself from the acts of its dishonest agent is *McMaster* v. *New York Life Insurance Co.*, 183 U. S. 25, 39 (1901).

One of the most astonishing contentions by this petitioner is the claim (its brief, page 19) that "the application should not be reformed since the applicant must stand responsible for the content of his application." This bland assertion is made notwithstanding the undisputed fact that the application in this case was altered by the petitioner's agent after it left the applicant's hands and wholly without his knowledge. None of the cases cited by the petitioner is helpful to it. None of the cases it cites is an action in equity for reformation. Furthermore, that ancient refuge of insurers, *i. e.*, that a prospect must be deemed to have read and understood every complicated document which an insurance agent has temporarily placed in his hands was of no avail to the company which tried to hide behind it in *Town of Enfield* v. *Clark L. Hamilton, et al., supra*, page 11.

The curious effort of the petitioner to bind the Circuit Court of Appeals to the law of Massachusetts such as expressed in the *Bogosian* case would be futile even if that

case dealt with the principles of reformation, a subject which it does not, in fact, even touch upon.

On page 20 of petitioner's brief, the claim is made that the respondent's prayer for reformation was denied by the District Court. This is a flat misstatement. While it is true that the District Court did not specifically order a reformation, the facts it found and the conclusions it reached could lead to no other result. It is perfectly plain that the reason it did not order reformation was because such a gesture would have been futile inasmuch as its erroneous construction of the contract prohibited a recovery by the respondent in any event. However, what the District Court did do was to find that the contract set forth upon the application form, *as it was executed by the parties and before the fraudulent alteration by Kelman took place,* left Question 12 unanswered and thereby effected an automatic election of the date of Part B as the date the insurance was to go into force. Thus, neither the District Court, had it found in the respondent's favor, nor the Circuit Court of Appeals, in ruling for her, was obliged to order a reformation, *for the reformation had already been made in the District Court's finding.* Contrary to the insinuation in the petitioner's brief, page 20, it would appear that the Circuit Court of Appeals was fully "conscious" of what it was doing.

It seems hardly necessary to comment upon counsel's reference to Section 4182 of the Connecticut General Statutes, Revision of 1930. Nothing in this section prohibits preliminary contracts such as are entered into every day by the companies doing business in Connecticut, nor is there anything in this case which indicates that the petitioner's standard forms of policy contained any provisions contrary to those set forth in its preliminary agreement. On the other hand, if the petitioner means to imply that the latter is so, its present attempt to hide behind the statute is not one likely to elicit sympathy. In any event, there is a considerable body of law which holds that insurers who do write contracts in violation

of statutory specifications cannot, in suits brought against them by policyholders, avail themselves of the statutory provisions which they have deliberately violated.

> *Armstrong* v. *Western Manufacturers Mutual Insurance Co.*, 95 Mich. 137, 54 N. W. 637 (1893); *Wojtzak* v. *Hartland Farmers Mutual Fire Insurance Co.*, 200 Wis. 118, 227 N. W. 255 (1929).

The purpose of these statutes is to protect the public against unfair practices by insurers rather than to provide the companies with technical defenses in suits such as this.

> *44 C. J. S.* 1053.

B.

There are no Connecticut decisions which are controlling with respect to the construction of the specific type of life insurance contract involved in this case.

So far as we have been able to ascertain, the Connecticut courts have never been called upon to resolve an issue involving ambiguous or conflicting provisions in a temporary or preliminary contract of life insurance, *i. e.*, the type of contract which exists between the date of application or medical examination and the date of policy issue or delivery. Thus, the impassioned tirades which appear throughout the petitioner's brief wherein (particularly, as at page 30) the petitioner's counsel calls the Circuit Court of Appeals "unreasonable, negligent and arbitrary" and otherwise incompetent, for failing to apply Connecticut law are astonishingly inappropriate. Not one of the cases cited on pages 29, 30 and 31 which are claimed by petitioner's counsel to support his notion of the Circuit Court's attitude and aptitude gives the slightest indication that the highest tribunal of Connecticut would

reach a different conclusion from that of the Federal Court. The case of *Swentusky* v. *Prudential Insurance Company,* 116 Conn. 526, 165 Atl. 686 (1933), upon which the petitioner places chief reliance was an action in tort in which the plaintiff charged unreasonable delay by the insurer in acting upon the application. The full first premium was *not* paid in advance and there was no issue whatsoever as to whether any insurance contract was in force from the date of the application. In fact, it is perfectly obvious that both the litigants and the court assumed that such was not the case.

There having been no applicable local law specifically governing the question of construction, the Circuit Court of Appeals was entirely correct in applying general law.

Terry v. *New York Life Insurance Co.,* 104 F. (2d) 498 (C. C. A. Mo. 1939);

American National Insurance Co. of Galveston, Texas v. *Belch,* 100 F. (2d) 48 (C. C. A. Va. 1938);

Bowen v. *New York Life Insurance Co.,* 33 F. Supp. 705 (D. C. Mo.), affirmed 117 F. (2d) 298 (C. C. A. Mo.), certiorari denied 61 S. Court 1102, 313 U. S. 583, 85 L. Ed. 1539 (1940);

New England Mutual Life Insurance Co. v. *Mitchell,* 118 F. (2d) 414 (C. C. A. Va. 1941), cert. denied 62 S. Court 60, 314 U. S. 629, 86 L. Ed. 505 (1941);

Zephyr American Corporation v. *Bates Mfg. Co.,* 128 F. (2d) 380 (C. C. A. N. J. 1942);

Hornstein v. *Cramer Bros. Freight Lines,* 133 F. (2d) 143 (C. C. A. Pa. 1943).

C.

Decisions closely in point in other jurisdictions as well as long-accepted principles of law as enunciated by Connecticut courts and in all other states overwhelmingly support the decision of the Circuit Court of Appeals.

It is our contention that the application, with Question 12 found unanswered by the District Court or a corrected answer supplied in accordance with our prayer for reformation, together with the temporary or binding receipt, constituted a contract of insurance which was in full force and effect between August 3, 1943 and the time of the applicant's death on or about August 25, 1943. The word "temporary" as used in our complaint was obviously intended as meaning "preliminary" in the sense that the early contract, evidenced by the application and binding receipt, would later be supplanted by the usual form of policy. Thus, the applicant being fully insurable, the insurance was in force on a permanent basis from the date of Part B, the medical examination.

The significant portions of the application and binding receipt which are to be considered under this issue are Question 12 in the application, Section B in the printed portion of the application following Question 18 and all of the material in the binding receipt. As the latter two are substantially the same in content and legal effect, we ask the Court to assume that we are referring to both whenever reference is made to Section B of the application.

The action of any kind of insurance company to which application for a policy of insurance is made must necessarily be predicated upon two things: (a) the representations made by the prospective insured in his application, and (b) information obtained by company

representatives, employees and investigators, both being subject to review by company underwriters before a final decision is made. This is true whether the company be a fire, casualty, marine, or life insurer. These steps are necessarily time-consuming and many days or many weeks may elapse between the date of application and the date of the company's final action thereon. In that interim period loss or injury to the proposed subject matter of the contract may occur. Therefore, in order to protect against this interim danger, it is the common practice of all types of insurers to enter into preliminary or temporary contracts which insure against the occurrence of loss pending the issuance of a formal policy, the only condition being that the event insured against shall, as the result of the insurer's subsequent investigation and review of the file, be determined to have been a satisfactory insurable risk on the date of the application. If it is found to be such, a formal policy is then issued to the insured bearing the date of the application as its effective date.

44 C. J. S., Insurance, 956, *et seq.;*
29 American Jurisprudence, p. 158, Section 143.

This temporary or preliminary arrangement has distinct advantages to both insured and insurer. The applicant gets the needed protection immediately, subject only to confirmation of insurability as of the effective date of the contract. The insurer, on the other hand, has the advantage of immediately binding the prospect and eliminating the risk of losing him to another company, such as would be the case if no contract were to come into force until after the sometimes lengthy investigation and underwriting review of the file are completed. An additional advantage of the highest importance to the insurer lies in the fact that a premium payment is ordinarily made at the time the preliminary binding arrangement is entered into. Thus if the insured later refuses

to accept his policy, the company is in a position to retain at least the first premium payment as a matter of right and thereby compensates itself for its underwriting costs even though the insurance may be allowed to lapse by the insured after the initial premium period has expired.

In the present case the trial court specifically found the existence of these mutual advantages. (Finding, Paragraph 14, Record, Part I, pages 44 and 45). The court, however, closed this paragraph of the Finding with the following sentence: "It is, however, undesirable, from the standpoint of the defendant, to permit any binding contract to be entered into prior to the completion of the underwriting activities and the final passing upon the risk by the home office." Conceding that certain of the petitioner's representatives made this claim during the trial, it is incomprehensible to us that the court could have adopted it. For one thing it is quite inconsistent with the preceding portion of Paragraph 14 and with other portions of the Finding. Furthermore, as a matter of law it cannot be true, for this reason: If the risk is an insurable one according to the company's standards, it will always be accepted and a policy issued, whereas if the risk is an uninsurable one it can, and will be, refused. In the latter case if a loss should occur in the interim before final action by the company's underwriters, no court could possibly force the insurer to accept the risk or to pay for the loss which has so occurred. We believe that this sentence in the Finding is one indication of the trial court's misconception of the type of contract with which we are here concerned.

The hundreds of cases and the many articles and textbooks written by authorities on this subject show that in life insurance as well as in other kinds of insurance there are essentially two types of negotiations which occur between prospects and insurers prior to the issuance of a formal policy. One contemplates a simple form of

application which is to be without value or legal significance to the applicant until final action is taken by the company. It is usually not accompanied by a premium payment. This type of initial proceeding formerly obtained to an almost exclusive degree in the life insurance business, as may be attested by a review of many of the earlier cases. In legal concept it is no more and no less than an offer which, until accepted by the other party, cannot ripen into a contract. It is obviously the type of situation which is contemplated in the second sentence of Section B, following Question 18 in the present application, which provides as follows:

> "If payment of the said premium was not made when this application was signed, any such policy will take effect as of its date of issue, and only if I have not consulted or been treated by a physician or other practitioner since the date of the completion of said Part B, and only if the policy is delivered to and received by me and the first premium or installment thereof is actually paid while I am alive and in sound health, and in any case, such delivery and payment shall constitute an acceptance of the policy and of all its conditions."

The other type of negotiation contemplates a preliminary or temporary binding arrangement such as has been briefly discussed hereinbefore. It is this type of immediate insurance protection which, we contend, is obviously meant to be provided, at the election of the applicant, by the wording of Question 12, the first sentence of the aforementioned Section B of the application and the "temporary" or "binding" receipt, with which we are dealing in the present case.

Evidence of the common practice among life insurers to enter into binding preliminary contracts, conditioned only on insurability, is found in the standard form of life insurance application set forth on page 535 of the Prentice-Hall "Insurance Principles and Practices" by Riegel and

Loman. And we would also refer the Court to a standard life insurance text, which contains the following:

> "When it is agreed between the parties, as is frequently the case, that the contract shall be in force from the date of the physical examination, provided the insured's health conforms to the company's standards, the policy dates from the examination regardless of the time delivery is made. To make the insurance effective from the date of examination, the companies require the payment of the first premium at or prior to the examination. Delivery of the policy in such a case has no significance other than to furnish the insured a written copy of the agreement. Death of the insured prior to receipt of the policy will not affect his right to recovery, nor is it necessary that the company actually have acted upon the application provided the insured was in such health as to pass the examination at the time it was made."
>
> *Magee, Life Insurance,* p. 395 (Published 1939 by Business Publications, Inc.).

A further examination of the cases demonstrates that these preliminary or temporary contracts of life insurance, which have been devised by insurance company lawyers and later incorporated into forms adopted by the companies for use in business practice, may be subdivided into two different forms or types.

See articles:

> *Illinois Law Review,* Vol. XXXIII, No. 2, June 1938, page 180;
> *Yale Law Journal,* Vol. XLIV, page 1133.

The first of these provides, in substance, that:

> "The insurance applied for shall be effective from the date of the application or medical examination provided that the risk is approved at the home office of the company."

The second type provides, in substance, that:

> "The insurance applied for shall be effective from the date of the application or medical examination provided that the Company is satisfied that on the date of such medical examination the applicant was insurable according to the company's rules for the amount and plan applied for."

An analysis of Section B, following Question 18, of the present application, together with the provisions of the "temporary" or "binding" receipt demonstrates that the petitioner has sought to combine both of these types of provision in one form of agreement. So far as can be ascertained from the court decisions, The John Hancock Mutual Life Insurance Company is the only company which has attempted to effect such a unique, confusing, unreasonable and unnecessary combination of conditions.

The law relating to these three types of agreement will be discussed in the order in which they have been mentioned.

1. Provisions making insurance effective on the date of the application or medical examination if the application has been "accepted" or "approved" at the home office.

In most of the cases which have arisen where companies using this form of application and binding receipt have sought refuge behind it, on the claim that "approval" is a condition precedent to liability if death occurs in the period intervening between the date of application and the date of final company action, the insurers have been rebuked, and the conditions which they have unsuccessfully sought to impose upon applicants under such forms have been scathingly denounced by the courts.

In *Hart* v. *Travelers Insurance Company*, 258 N. Y. S. 711, 236 App. Div. 309, affirmed 185 N. E. 739, 261 N. Y.

563 (1932), and followed in *Buono* v. *Prudential Insurance Company of America*, 267 N. Y. S. 972, 240 App. Div. 898 (1933), the suit was on an alleged temporary contract of insurance based on an application and binding receipt, of the kind here under discussion, which was issued on August 15, 1927. The applicant died on August 16, 1927, before the company had acted in any manner upon the application.

In answering the contention of the insurer that the applicant was never insured because his application had not been "accepted", the court said:

> "* * * The insurance company now states in effect that the object of this provision was to enable the insurance company to collect premiums for a period during which there was no insurance and consequently no risk. By the first subdivision of this binder the company agreed that, if the full premium was paid when the binder was signed the insurance would be in force from the date of the receipt. The money having been paid, there was a complete contract between the parties, and, if this is so, this action may be maintained. Furthermore, if the construction to be placed upon this binding receipt is not that Levy was to be insured from the date of the binder until the formal policy was issued or the risk declined by the defendant, then it must be said that this binding receipt is at least ambiguous, and, if so, it should be construed against the company; it having been drawn up by the agent of the company upon its printed form. I therefore advise that the judgment be reversed on the law, with costs, and judgment directed in favor of the plaintiff for $5,000, with interest from August 16, 1927, with costs."

It is true that in three New York decisions the courts appear to have adopted an approach somewhat different from that used in the *Hart* and *Buono* decisions. *Corning* v. *Prudential Insurance Company of America*, 288 N. Y. S. 661, 248 App. Div. 187, affirmed 273 N. Y. 668, 8 N. E. (2d)

338 (1937); *Arcuri* v. *Prudential Insurance Company of America,* 290 N. Y. S. 567, 248 App. Div. 501 (1936); *Hughes* v. *John Hancock Mutual Life Insurance Company,* 297 N. Y. S. 116, 163 Misc. 31 (Municipal Court, 1937); judgment, as modified by the Appellate Term, affirmed, 3 N. Y. S. (2d) 899, 254 App. Div. 570 (1938). The facts in these cases may be distingushed from those in the *Hart* and *Buono* cases. For instance, in the *Corning* case, which is, incidentally the only one of the three that went to the Court of Appeals, the application was declined the very day that the applicant died. The novel feature of these decisions is, however, the ruling that an ambiguity isn't important unless the conflicting provisions appear in separated clauses in the application form. However, this artificial and, we submit, wholly unjustifiable, distinction flies squarely in the face of the overwhelmingly accepted rule that all ambiguities, inconsistencies and repugnancies must be resolved against the insurer and in favor of the insured, the former having it clearly within its power to make its contracts clear and unequivocal in meaning. If a contract contains language which conflicts with other language therein, and thus makes the meaning of the entire instrument uncertain, it would seem to be wholly irrelevant whether one of the provisions immediately follows the other or whether it appears in an entirely different part of the contract.

Another case concerned with this type of "approval" condition is *Starr* v. *Mutual Life Insurance Company of N. Y.* (Wash.), 83 Pac. 116 (1905). In that case the application and binding receipt were executed on November 30, 1903. The insured died on December 8, 1903 before any action of acceptance or rejection had been taken by the company.

In overruling the contention of the petitioner that no insurance was in force because the company had not approved the application, the court said:

"* * * If he lived until the application was approved

> and a policy issued, it would seem a matter of indifference to him whether he had been insured during the interim between the date of the application and the date of the issuance of the policy. On the other hand, if he died before the application was approved and the policy issued, his beneficiaries would derive no benefit from the insurance. The chief object of the provision would, therefore, seem to be to enable the insurance company to collect premiums for a period during which there was in fact no insurance, and consequently no risk."

The insertion of a clause in a premium receipt purporting to provide insurance pending action by the insurer upon the application by making the same conditional upon approval or acceptance at the home office has been characterized as a mere "trick" on the part of an insurance company to deceive an applicant into the belief that he has temporary insurance and thereby induce him to part with his money in advance of the issuance of the policy.

> *Francis* v. *Mutual Life Insurance Co.*, 55 Ore. 280, 106 P. 323 (1910).

In an Ohio suit involving similar forms the plaintiff was allowed to recover.

> *Prudential Insurance Company of America* v. *Howard*, 18 Ohio L. Abs. 688 (1935).

We do not necessarily subscribe to all of the dictum in that case but the ultimate decision appears to be a sound one. The case was decided on January 16, 1935 by the Ohio Court of Appeals, First District, Butler County. The decision is not printed in any published report. Neither was it rendered by the highest court in Ohio. However, it was expressly approved in an even more liberal decision rendered by the Supreme Court of Ohio, *Duncan* v. *John Hancock Mutual Life Insurance Company*, 137 Ohio St. 441, 31 N. E. (2d) 88 (1940), a case which will be hereinafter discussed in more detail.

2. Provisions making the insurance effective as of the date of the application or medical examination provided the applicant was, on such date, an insurable risk according to the company's standards.

In *Reynolds* v. *Northwestern Mutual Life Insurance Co.* (Iowa), 176 N. W. 207 (1920), the court had before it for construction an application which recited that if the first premium were paid the insurance should take effect from the date of the application "provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination."

The court decided, page 209, that:

> "Unless the application is, in the proper exercise of the company's rights, under the law and the contract, rejected, and the insurance refused, the preliminary contract provides protection from the date of the medical examination, and if death results from some cause arising after the date of such examination, the company is liable upon the contract, according to its terms; but if the company, in the proper exercise of its legal rights, under the law and the contract, which it is unnecessary for us to define in this opinion, rejects the application upon the ground that the applicant is not insurable and returns the premium paid, no liability can arise thereunder. * * * The insurability of the applicant is, by the contract, made the test of the company's liability."

For other decisions in point the Court is respectfully referred to the following cases:

Stonsz v. *Equitable Life Assurance Soc. of U. S.*, 187 Atl. 403 (1936);

New York Life Insurance Co. v. *Abromietis*, 254 Mich. 622, 236 N. W. 769 (1932);

Wolfskill v. *American Union Life Insurance Co.*, 172 S. W. (2d) 471 (1943);
Western & Southern Life Insurance Co. v. *Vale* (Ind.), 12 N. E. (2d) 355 (1938);
Albers v. *Security Mutual Life Insurance Co.*, 41 S. D. 270, 170 N. W. 159 (1918);
Colorado Life Insurance Co. v. *Teague* (Tex.), 117 S. W. (2d) 849 (1938).

Many of the forms discussed in the foregoing cases under this topic provide that the evidence of insurability must be to the "satisfaction" of the company. These decisions are all in accord with the general principle of contract law which rules that where a contract provides that something must be done to the "satisfaction" of one party the condition is regarded as requiring no more than that the promissor shall "render performance which shall be satisfactory to the promisee if he exercises an honest judgment."

Williston on Contracts, Revised Edition, Sections 44, 675A;
Restatement, Contracts, Section 265.

For cases sustaining the validity of this proposition in insurance law, reference is respectfully made to:

Thompson v. *Postal Life Insurance Co.*, 226 N. Y. 363, 123 N. E. 750, 751 (1919);
Illinois Bankers Life Ass'n. v. *Palmer,* 176 Okla. 514, 56 P. (2d) 370 (1935);
Kahn v. *Continental Gas Co.*, 325 Ill. App. 1, 59 N. E. (2d) 524 (1945);
New York Life Insurance Co. v. *Dandridge,* 202 Ark. 112, 118-119, 149 S. W. (2d) 45, 134 A. L. R. 1519, 1534 (1941);
Union Life Insurance Co. v. *Bolin* (Ark.), 145 S. W. (2d) 734 (1941);

Sussex v. *Aetna Life Assurance Co.*, 33 D. L. R. 549, 552, 38 Ont. 365;
Kennedy v. *Occidental Life Insurance Co.* (Cal.), 117 P. (2d) 3 (1941).

3. The John Hancock forms of application and binding receipt.

These forms, if the decisions are any clue to the general trend of the business, are an innovation, something entirely new and different for applicants and prospects to contend with. Here the company not only provides that immediate insurance is contingent upon "satisfactory" proof of "insurability", but adds the further condition that the application must be "approved" at the home office, and then ties it all up very neatly by requiring that this "approval" must occur before the death of the applicant. Thus the company, as the result of the sly planning of its legal department, has attempted to place itself in a position to claim, if it wishes to hold the applicant to his agreement, that he is bound by a contract. On the other hand, if because of some development subsequent to the date of Part B (the medical examination), such as the death in the instant case, it does not wish to be bound by the papers, it can claim that the essential contract element of acceptance by the offeree, viz: "approval" of the application in this instance, is lacking, so that no contract exists. The petitioner, in all solemnity and, in fact, with quite a show of indignation, has stood pat on this unheard of proposition. By doing so, *i. e.*, by contending that the absence of an express final approval of the application at the home office precludes the existence of insurance from the date of Part B, the petitioner, in effect, shamelessly admits that the following are the necessary results if such a premise were to be upheld by the courts:

(a) Regardless of the fact that there is no doubt about

his insurability, if the applicant dies prior to approval he has never had any protection although the company has had the use of his money from the date of the binding receipt to the date of death and although it has, both orally and in writing, authorized its agents to delude prospects into the belief that immediate payment of the premium may give protection from the date of Part B.

(b) If the applicant lives and is "approved", his insurance protection starts only as of the date of such "approval" notwithstanding the fact that he has actually paid for such protection from the date of Part B.

Example: It is a well known fact that in practically all types of "ordinary" life insurance contracts, including "whole life" and "endowments" maturing in old age, no reserve begins to accumulate until the second or third year of the policy's existence. Thus all of the early premiums are used in payment for pure "protection". And in term insurance no reserve *ever* accumulates. Therefore, let us consider the example of the prospect who desires a large policy upon which the quarterly premium amounts to $3,000. He applies to the company, pays the first quarterly premium of $3,000 in advance, and elects to have Part B as the effective date of his insurance. The company takes approximately two months to investigate the risk—and it frequently takes this much time, or longer, according to the testimony of its own "experts" during the trial—and then "approves" the application and forwards the policy to the applicant. The applicant may not know it, and presumably doesn't because of the tricky wording of the application, but is it not perfectly plain that as to $2,000 out of the $3,000 so paid and retained by the company, the latter has given *absolutely nothing* in return?

(c) If the applicant lives but is declined, the company has had the use of his money in the interim period between the date of the binding receipt and the date of rejection without giving him anything in return therefor. Surely

the fact that the court found (Record, Part I, page 73, Paragraph 69) that this premium money is held in "suspense" at the district agency can be of no avail to the petitioner, for the instruments themselves in no way restrict the use of such monies once they have been received by the petitioner.

(d) Notwithstanding the contrary language in the binding receipt, application, rate book, agency manual and contrary instructions by the company to its agents, it would be impossible under any circumstances whatsoever for insurance to be in effect prior to the date of approval at the home office.

Surely, quite apart from the idea of fairness to the public, which does not seem to concern this petitioner, it should have used better judgment in the preparation of its forms. For it has had, in the very recent past, an experience which should have taught it a lesson. In *Duncan* v. *John Hancock Mutual Life Insurance Co.* (Ohio), 31 N. E. (2d) 88 (1940), cited *supra*, the situation was as follows: On September 9, 1937 Dell B. Duncan applied in writing for life insurance in the defendant company, accompanying his application with an advance premium payment, and receiving the customary receipt from the company. On September 24, 1937 Mr. Duncan became ill, and he died on or about September 29, 1937. The company denied liability and the beneficiary brought suit.

The receipt issued by the company to the applicant contained the following language:

> "It is understood and agreed that no liability is assumed by the company on account of this payment nor until it shall issue a policy, but if death occurs after the date of the application from which this receipt is detached and prior to the date of issue of such policy, payment in accordance with and subject to the conditions and provisions of the policy applied for shall be made; provided the applicant is insurable under the company's rules and the applica-

> tion is approved and accepted by it at its home office as to plan, premium and amount of insurance. If a policy is issued, the deposit will be applied to payment of the premiums thereon from its date, otherwise the deposit will be returned to the payer thereof upon surrender of this receipt."

It was stipulated that the application had neither been "accepted or approved" by the company nor had it ever been rejected by the company.

The court ruled, page 91, that:

> "The provisions of the receipt are obviously ambiguous and susceptible of two different constructions. It was possible for the appellee, as composer of the provisions of the receipt, to have been clear and thereby to avoid ambiguity. 'An insurer will not be permitted to benefit from an ambiguity of his own creation.' "

And the court held, page 91, that under an agreement couched in such language

> "the parties will be deemed to have intended to effect a present contract of interim or temporary insurance on the life of the applicant, to commence immediately upon the signing of the application and payment of the initial premium."

The insinuation that the later Ohio case of *Leube* v. *Prudential Insurance Company of America,* Ohio St. , 72 N. E. (2d) 76 (1947) (petitioner's brief, page 34) somehow departs from the sound law of the *Duncan* decision is wholly misleading. In the *Leube* case the court expressly reaffirmed the Duncan holding but ruled that it could not avail the plaintiff because the company had rejected prior to the applicant's death.

There can be no sound argument that the receipt in the *Duncan* case and the receipt in this case are not precisely the same in their legal effect. The company may argue that the words "but if death occurs after the date of the application from which this receipt is detached

and prior to the date of issue of such policy, payment in accordance with and subject to the conditions and provisions of the policy applied for shall be made;" do not appear in the application form signed by James A. Gaunt, Jr. That is true, but in our application the company warrants that "the insurance applied for shall be in force as of the date of completion of said Part B". Perhaps the company, as the result of the *Duncan* decision, thought it would be a clever move to substitute, in subsequent forms, this latter provision for the quoted provision in use at the time of the *Duncan* application. But what is the "insurance" referred to in our application? Was it not "life insurance"? And is not "life insurance" a promised indemnity against the contingency of death? Does it make any difference whether the company tells a man that it has "insured him against death" or tells him that in the event of his death it will pay him "in accordance with and subject to the conditions and provisions of the policy applied for"? How can the company contract to make payment in a certain amount if death should occur within a certain period and at the same time contract that no payment shall be made if death should occur within that period?

It can hardly be argued that by adding together two conditions, each of which has repeatedly been held by the courts *not* to militate against the existence of present interim insurance, the company could thereby obtain a sum total of legal effect which differs in substance from the legal effect of its individual components. This fact in itself would appear to provide an answer on this issue. Yet there is even a simpler and more logical solution to the problem, and that is reached by merely applying the time-tested rules of construction to the language of the instruments which are involved in the present case.

The Law Re Ambiguities and Repugnancies.

It would appear that the initial step to be taken by any court in determining the legal effect of written words, the meaning of which is in issue, is, by ascribing to each of the words its normal meaning and significance, to decide whether there is any occasion to apply accepted rules of construction.

> "The courts may resort to construction, in the usual sense, of a contract of insurance only when the language of the contract *in its ordinary meaning* is indefinite, ambiguous, or equivocal; if the language employed is clear and unambiguous there is no occasion for construction or the exercise of a choice of interpretations." (Italics ours.)
>
> *44 C. J. S.* 1139.

Language must be given its ordinary meaning unless a technical or special meaning is clearly intended and "words are to be construed according to their strict and primary acceptation" except where extraordinary circumstances clearly indicate a meaning other than the accepted one.

> *Wood* v. *Employers' Liability Assurance Corporation,* 41 Fed. (2d) 573, 575 (1930);
> *Trumbull Electric Mfg. Co.* v. *John Cooke Co.,* 130 Conn. 12, 16, 31 Atl. (2d) 393 (1943).

It seems to us that the practical application of these principles in the present case would be as follows: A reading of Question 12 indicates that the company clearly intended to give the applicant a choice as to the effective dates of his insurance. All of the words used in Question 12 are simple enough and, we submit, have an established meaning in the English language. It would hardly seem necessary to resort to a dictionary to determine their definitions. Yet we must do this because the peti-

tioner has taken the position that the word "insurance" has a meaning which was heretofore unheard of by us. We therefore look to *Webster's New International Dictionary, Second Edition,* and find that the primary definition of the word is given as follows:

> "INSURANCE. 1. Act of insuring, or assuring, against loss or damage by a contingent event."

Not trusting entirely to Webster, we look to the outstanding lawyers' handbook on legal definitions, *Bouvier's Law Dictionary, Unabridged, Rawle's Third Revision,* Vol. I, page 1613, and find the following:

> "Insurance. A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils."

Although, after reading some of the unique arguments advanced by the petitioner in some of its briefs on this case, we have sometimes wondered whether it would actually concede that these papers deal with life insurance, there would really seem to be little room for dispute as to the significance of the election permitted by Question 12.

We next turn to the printed matter which follows Question 18 and find in Section A thereof an agreement that the application shall be deemed to be "a part of the *contract of insurance.*" Presumably the word *insurance,* as used in that sentence, has the same significance which must be ascribed to it in Question 12. And it also might be noted that, as the word *policy* is absent from this sentence, the company must be assumed to have contemplated that insurance coverage might result from something other than the formal execution and delivery of a policy.

Coming to Section B of the same paragraph, we arrive at the very crux of this case. Even a cursory glance at the first sentence of Section B demonstrates that under

certain conditions "the insurance applied for shall be in force as of the date of completion of said Part B" (the medical examination form). Here again we find the word *insurance* and the insurance spoken of is that which has been *applied for,* so, in this instance, it presumably means the petitioner's $15,000 "Endowment at Age 85" contract with double indemnity, for surely nothing else was "applied for" by this applicant. Here also we find the term *"shall be in force",* language which is peculiarly appropriate in describing the effective period of insurance contracts. We next examine the conditions which must be met before the insurance can be in force from the date of Part B and find that they are:

1. That "the first premium or installment thereof above stated was paid when this application was signed". This condition was admitted by the petitioner, and specifically found by the court, to have been complied with. (Finding, Paragraph 13).

2. That the company be "satisfied that on the date of the completion of Part B" the applicant was "insurable in accordance with the Company's rules for the amount and on the plan applied for without modification". This condition was specifically found by the trial court to have been complied with. (Finding, Paragraphs 28, 50 and 51).

3. That the "application, including said Part B", be, prior to the applicant's death, "approved by the Company at its Home Office". Although the medical department of the petitioner's home office had positively approved this application on the morning of August 26, 1943, this act took place after the applicant's death. Thus, as we have made no effort at any stage of this case to distort the plain English meaning of any of the words in the application and binding receipt, we could not and cannot contend that this condition had been complied with.

4. That (as set forth in the last clause of the sentence) the application shall not provide for the insurance

to be in force as of the date of policy issue. It will be noted that the trial court found (Record, Part I, page 40) that the application, as executed by the applicant—and he was the only one who *could* execute it—and prior to the surreptitious unauthorized modification by Kelman, left Question 12 unanswered. Thus, this condition had also been specifically complied with.

Now if the third condition, *i. e.*, the "approval" proviso, is a valid condition precedent to the inception of any contract of insurance, then obviously we have no case. However, if this condition must be taken literally, then all of the rest of the context in which it appears becomes quite meaningless. For, if no insurance could start until the date of approval at the home office, a date concededly some, and perhaps many, days subsequent to the date of Part B, then it is surely apparent that that portion of the context providing for insurance from the date of Part B is meaningless. Thus, the presence of the "approval" proviso creates an ambiguity in the context, is wholly out of line with the other portions thereof and is utterly repugnant to them. Accordingly, the situation is a proper one for the application of the rules governing the construction of such writings.

3 C. J. S. 1037.

> "The general rule of construction applied by the courts to all contracts of insurance is that while like other contracts they are to be so construed as to give effect to the intention of the parties, yet where there exists any doubt as to that intention it is always to be resolved strictly against the insurer and in favor of the insured."

Vance on Insurance, Second Edition, page 689.

And see

Dresser v. *Hartford Life Insurance Co.*, 80 Conn. 681, 70 Atl. 39 (1908).

"The rule has also been stated that where the

policy is so drawn as to require construction it will be construed in favor of insured; and that, where it is fairly susceptible of such an interpretation, it will be construed so as to afford protection to insured, or to permit him to recover for his loss, or to sustain, rather than defeat, his claim for indemnity under the policy, or the rule will be construed by the courts to allow a greater indemnity."

44 C. J. S. 1179-1180.

"To hold the insured strictly to terms in the choosing of which he had no part, and the meaning of which he often cannot understand, would often work gross injustice which the courts are loath to inflict."

Vance on Insurance, supra, page 201.

"The rule of construction in favor of the insured is applicable to applications for insurance as well as to insurance policies themselves. An application for insurance prepared by the insurer, or a question in an application for insurance which is propounded and formulated by the insurer, where it is ambiguous, will be construed most strongly against it and in favor of the insured. The applicant is also entitled to the benefit of any ambiguity in the terminology of conditional receipts in effect pending the issuance of life, health or accident policies. For instance, any doubt as to whether a binder receipt issued for the initial premium pending an application for a life insurance policy operates to put the insurance into immediate effect must be resolved against the insurer."

29 American Jurisprudence, 187.

"The rule of strict construction against insurer and liberal construction in favor of insured applies to all parts or provisions of an insurance contract or policy *including words or terms,* phrases susceptible of more than one construction, and sentences, or *clauses* of doubtful meaning or susceptible of more than one construction; * * * *conflicting, inconsistent or repugnant provisions* * * * and even questions and answers or other statements, in the application, of doubtful meaning." (Italics ours.)

44 C. J. S. 1180-1183 (the reference to inconsistent or repugnant conditions being supported by 45 Federal and State decisions in footnote 76, pages 1182-1183).

The foregoing principles and rules appear to be universally accepted.

13 C. J. 535, 536; 1152-1155;
29 American Jurisprudence, Insurance, Section 166;
Annotation, 153 A. L. R. 794, 801;
Porto v. *Metropolitan Life Insurance Co.,* 120 Conn. 196, 200, 180 Atl. 289 (1935);
Fogarty v. *Fidelity & Casualty Co.,* 120 Conn. 296, 303, 180 Atl. 458 (1935);
King v. *Travelers Insurance Co.,* 123 Conn. 1, 6, 192 Atl. 311 (1937).

When faced with a problem of this kind the objectives of the court are, of course, to determine the true intention of the parties and, by considering all of the circumstances under which the agreement was executed, to give it a fair and reasonable legal effect.

New Britain Real Estate & Title Co. v. *Hartford Acceptance Corporation,* 112 Conn. 613, 615, 153 Atl. 658 (1931).

In attempting to reach this objective the court may use extrinsic evidence and other "secondary" rules of construction.

Adams v. *Turner,* 73 Conn. 38, 45, 46 Atl. 247 (1900);
Trumbull Electric Mfg. Co. v. *John Cooke Co., supra,* at page 17 in the Connecticut Report;
33 C. J. 115.

The real significance of the agreement here in question is, we submit, made readily apparent by merely considering the aims of the two parties, *i. e.*, the applicant wants immediate protection and is willing to advance his money to secure that objective, whereas the company, like all insurance companies, desires the new business and is willing to make certain concessions if it can get an immediate premium payment and thereby obtain security against the possible inroads of competitors before the actual date of policy issue and delivery. This is a matter of common knowledge as will be confirmed by many of the millions who have felt the pressure of life insurance solicitors, most of whom say, in effect, "It would be wise for you to pay the first premium now so that we can bind this agreement. If you do that and you are insurable the company will pay your beneficiary even if you should be killed on your way home tonight and before the home office has received the papers." It is, therefore, scarcely necessary to invoke the help of the "secondary" aids to construction. However, as some of these fit so plainly into the pattern of the present argument, we think it would not be amiss to mention two or three of them:

(a) A construction adopted by the parties.

The Finding and Amendments to Finding (Record, Part I, pages 44 and 71) make it perfectly clear that the parties to the present transaction understood and intended, at least at the time of execution of the papers, which was prior to Kelman's fraudulent alteration thereof, that it should put the insurance in force from August 3, 1943, the date of Part B, if the applicant was then an insurable risk. (Of course, the full picture as to insurability on that date would not be developed until some days later, as was understood by both parties, and the application permitted the insurer to gather further information on that point. But had the applicant been killed five minutes

after leaving Dr. Sandulli's office, the opportunity for determining insurability as of that day would thereby be diminished hardly an iota.) This method of determining the intention of the parties in ambiguous contracts has not infrequently been adopted by the courts.

44 C. J. S. 1139.

(b) Construction by the insurer's agent.

There is, of course, language in the application (Section C) which purports to restrict the authority of company representatives in various respects. However, there would seem to be nothing in these restrictions which would limit the apparent authority of any soliciting agent to describe and explain and, if necessary, to construe and interpret, the product which he is attempting to sell for his principal. It would be obviously impossible for any life insurance company or, indeed, any company which sells its products through field representatives, to operate efficiently without delegating such power and authority to its agents. These natural assumptions should be sufficient without more but, in this instance, Kelman's apparent authority is confirmed beyond doubt to have been actual authority because the trial court found (Record, Part I, page 44, Paragraph 14) that "the company sales force is instructed to stress the claimed advantage to the applicant of coverage from the time of the medical examination upon the payment of the premium at the time of application." This being so, how can there be any question but that his advice to the applicant, *i. e.*, that the payment of the first premium would effect immediate insurance protection, is binding upon the company he represented?

> "• • • And representations as to the scope of a policy, or the risks covered, made by an agent authorized to solicit insurance, take applications, collect and remit premiums, and deliver policies, and which

apparently are within the scope of his authority, to one whom he solicits, and who relies thereon, are binding upon the insurance company."

Couch, Cyclopedia of Insurance Law, Vol. 2, page 1622.

See also:

Vance on Insurance, Second Edition, pages 418-419;

Kendrick v. *Mutual Benefit Life Insurance Co.,* 124 N. C. 315, 32 S. E. 728 (1899);

Edwards v. *Masonic Mutual Life Ass'n,* 86 W. Va. 339, 103 S. E. 454 (1920);

Brady v. *Bankers Casualty Co. of Minneapolis,* 114 Kans. 865, 220 P. 1033 (1923);

Schulz v. *Benefit Ass'n of Railway Employees,* 175 S. C. 182, 178 S. E. 867 (1935).

In *Dresser* v. *Hartford Life Insurance Co.,* 80 Conn. 681, 70 Atl. 39 (1908), the insurer's prospectus, which purported to explain the terms of its contract, the latter being ambiguous in form, was given controlling weight in determining the proper construction to be placed on the instrument.

Whether the binding effect of the agent's construction of an ambiguous instrument be grounded upon apparent authority, actual authority or estoppel would seem to be immaterial.

(c) Legal effect determined by reference to prior judicial construction.

At the time it entered into its agreement with the applicant, this company had had almost precisely the same form of application, replete with the same contradictory clauses, judicially construed in *Duncan* v. *John Hancock Mutual Life Insurance Company, supra,* and thus was

aware that the agreement was, in the eyes of the law, an insurance contract from the moment of its execution if the applicant was insurable.

> "If the insurer continues to issue, without change, policies, clauses of which have been judicially construed, it will be considered as issuing them with that construction placed on them even though such construction violates the literal sense of the words used."
>
> *44 C. J. S.* 1154.

The Trial Court's Decision.

One of the most paradoxical aspects of this entire case is the petitioner's resolute insistence that the trial court was right while, at the same time, it derides the very essence of the reasoning used by that court in reaching its decision. This situation has logically developed out of the two wholly inconsistent positions which petitioner's counsel assumed in his initial approach to the problem of construction. He argued in the District Court that the application and binding receipt constituted an agreement which, he contended, was not a contract of life insurance, but rather an agreement under which the applicant, by paying his first premium in advance, was given a *quid pro quo* in the form of certain "legal benefits" or "advantages". For example, he said, one such "advantage" would be the legal right to have insurability determined as of the date of medical examination so that if the applicant became uninsurable between that date and the date of policy issue he would still be entitled to his policy. Later, because he wished to argue that the Gaunt boy became uninsurable after August 3rd because he gave up his job and started on a trip to the West Coast, counsel abandoned his claim as to this particular "advantage". Yet the District Court adopted counsel's line of reasoning and ruled, in its decision of April 17, 1946, that the instruments constituted a contract. In so doing, the court

found that the instruments were of doubtful meaning but, in a construction which it admitted was "strained", held that the words "the insurance applied for shall be in force as of the date of completion of said Part B" actually meant that the so-called "advantages" were what the applicant received under the contract.

The conclusion that a contract existed between the insurer and the applicant as of August 3, 1943 was obviously correct. The payment of the first quarterly premium and the decision by the applicant to give up his pending efforts to obtain his life insurance elsewhere were detriments to himself and benefits to the petitioner. The petitioner's agreement to give something in return was a detriment to the petitioner and a benefit to the applicant. These various benefits and detriments were simultaneously exchanged. Thus every element essential to the formation of a contract was present. Notwithstanding the petitioner's efforts to hedge and to becloud the insured's rights under these instruments, it is of the greatest significance to note that its legal experts used the words "in consideration of" in the binding receipt in describing the benefits which were to inure to the applicant in return for his immediate premium payment. These words are not often used by legal draftsmen in instruments which are other than contracts.

The reason that the trial court "strained" the words "insurance applied for" by defining them in terms hitherto unheard of was that it, for some reason which we have never understood, felt obliged to leave the wording of the contract intact and to give every word some significance however illogical it might be. In so doing the court felt that it would then be able to interpret the approval condition *in its literal sense*. Just why the words which most favored the company should be treated in their dictionary sense while the words which most favored the applicant should be distorted to mean something which no ordinarily intelligent person would understand them to mean has never been explained. In so do-

ing, the District Court destroyed the respondent's case. But by doing so it also, quite unwittingly, completely refuted its earlier correct premise that the documents constituted a *contract*. For, under the court's construction, the petitioner retained the complete, unfettered right to reject the application for any reason or no reason. Of what avail then were the "advantages" which the applicant obtained under his "contract"?

In a brief filed in support of a motion to correct the findings and modify the judgment, we advanced the foregoing arguments in considerable detail. It seemed to us that if we could but persuade the trial judge that the one possible, proper legal construction of this contract could be reached only through the simple and required process of deleting, in effect, the repugnant "approval" proviso, then we must prevail. We therefore placed considerable emphasis upon the undisputed rule governing repugnancies and the cases which support it.

This rule is of course that where there are two or more conflicting or inconsistent provisions in an insurance agreement that one most favorable to the insured should be adopted to the exclusion of the other.

Prudential Insurance Co. of America v. *King* (C. C. A. Mo.), 101 F. (2d) 990 (1939);

New York Life Insurance Co. v. *Jackson* (C. C. A. Ill.), 98 F. (2d) 950 (1938);

Harvey v. *Union Central Life Ins. Co.*, C. C. A. S. C., 45 F. (2d) 78, certiorari denied *Union Central Life Ins. Co.* v. *Harvey*, 51 S. Ct. 353, 283 U. S. 829 (1931);

Sovereign Camp, W. O. W. v. *Hardee*, 188 Ark. 542, 66 S. W. (2d) 648 (1934);

National Equity Life Ins. Co. v. *Bourland*, 179 Ark. 398, 16 S. W. (2d) 6 (1929);

New York Life Ins. Co. v. *Bird*, 152 Fla. 532, 12 So. (2d) 454 (1943);

Kimbal v. *Travelers Ins. Co.*, 151 Fla. 786, 10 So. (2d) 728 (1942);
Fokes v. *Interstate Life & Accident Ins. Co.*, 59 Ga. App. 680, 2 S. E. (2d) 170 (1939);
American Inv. Co. of Ill. v. *U. S. Fidelity & Guaranty Co.*, 267 Ill. App. 370 (1932);
Hungate v. *New York Life Ins. Co.*, 267 Ill. App. 257 (1932);
Nalty v. *Federal Casualty Co.*, 245 Ill. App. 180 (1927);
Bean v. *Aetna Life Insurance Co.*, 111 Tenn. 186, 78 S. W. 104 (1903);
Jones v. *Pennsylvania Casualty Co.*, 140 N. C. 262, 52 S. E. 578 (1905).

This reasoning clearly influenced the District Court for, although it failed to reverse the judgment, it filed a second memorandum of decision on July 23, 1946 (Record, Part I, page 75) in which it discarded the "contract" theory of "advantages" and simply ruled that because of the presence of the "approval" condition the respondent could not prevail. In this new and wholly negative approach, the District Court made no effort to say what the contract means; it merely set forth what it did *not* mean. Thus the ultimate result in the District Court was a final judgment without affirmative analytical support. It is not difficult to ask: How could the "layman" upon reading the approval proviso consider that he had insurance in force from the date of Part B? But this ignores the remaining and much more important question: How could the layman read the "insurance in force as of" provision and *not* conclude that he had insurance in force as of the date of Part B? It also ignores the legal effect of the agent's representations and the company's specific authorization to its agents to solicit immediate premium payments in exchange for the benefits of immediate protection. Therefore, in its final form, the lower court's decision said no more than: "The court

refuses to hold that the 'approval' provision is not effective and therefore the plaintiff cannot recover." This, we submit, was not a fulfillment of the court's function, for that function was to announce to the parties, after proper application of the controlling principles and rules of law, an affirmative statement of the meaning and legal significance of the parties' contract. The court's dilemma was plain, for once it had determined to save and give effect to the repugnant clause at all costs, it had no alternative but to avoid a positive reasonable construction of the entire contract.

The second memorandum of the District Court had this effect, however. It finally convinced even petitioner's counsel that the Circuit Court of Appeals would be most unlikely to accept the argument on "legal benefits", *i. e.*, a contract for "advantages" but not insurance, which he had persuaded the District Court to adopt in its first memorandum. He therefore dropped that notion and in the Circuit Court of Appeals concentrated, as he does here, upon the concept of the application and binding receipt as evidencing a mere *offer* to his client.

In the light of this marked change in petitioner's attitude toward the problem, its counsel's repeated assertions that the District Court's decisions constituted an authoritative pronouncement of Connecticut law are most unconvincing. In passing, it seems hardly necessary to remind the Court that the conclusions of the District Court Judge on the question of construction are not only unsupported by reference to Connecticut cases, of which there are none which would be helpful; there are, in fact, *no cases* cited in support of those conclusions.

The solution was and is not a difficult one: Eradicate the unfair and repugnant condition and the contract stands as a sensible, reasonable agreement, wholly consistent with the intentions of the parties and their obvious objectives. So construed and with the question of insurability determined in the respondent's favor, as it has been, the agreement is a binding, preliminary contract of life insur-

ance quite similar to those discussed in *Reynolds* v. *Northwestern Mutual Life Insurance Company* and *Stonsz* v. *Equitable Life Assurance Society of U. S., supra,* page 25. This, in substance, was what the Circuit Court of Appeals did and in so doing it simply followed the pertinent decisions of other jurisdictions and those universally accepted principles of insurance contract construction which are the law of Connecticut and every other jurisdiction in this country.

Insurability.

The District Court's finding of insurability was a finding which, as appears in the record, could not have been otherwise even if the actions and words of the petitioner's own representatives, investigators and underwriters were the sole basis for it.

Without doubt, the attack on the finding of insurability is the most absurd and unfounded of the many dubious contentions which appear in the petitioner's brief. In the first place, the contract categorically provides that the determination of insurability shall depend upon the rules of insurability of the John Hancock Mutual Life Insurance Company and not upon the rules of the Lincoln National Life Insurance Company, or any other company. Furthermore, as paragraph 6 of the District Court's finding (Record, Part I, page 38) clearly shows, the petitioner's rules permitted the issuance of up to $70,000 in life insurance upon the life of an applicant of the decedent's age. There was no qualification to this rule but, as shown in the same paragraph of the finding, there was simply a second rule, not referred to in the contract, under which the petitioner would reinsure any amount over $10,000. The applicant, being insurable under the petitioner's rules, the latter could have automatically bound the Lincoln National to the excess $5,000 or it could have submitted the proposition to Lincoln on a facultative basis. What Lincoln would have done or would not have

done is of absolutely no consequence for the real question was whether this applicant was physically, morally and financially insurable *under the petitioner's rules relating to insurability.* However, even if the Lincoln's attitude were to be regarded as a relevant factor on the issue of insurability, the District Court, in paragraph 51 of its finding (Record, Part I, page 51) found that Lincoln would have accepted the risk for the additional $5,000 with double indemnity and would have so notified the petitioner within three days after the receipt of the file and request. Contrary to what the petitioner would, by implication, have this Court believe, the finding of fact in paragraph 51 was fully supported by expert testimony during the trial in the District Court. And no effort has ever been made by the petitioner to seek an appellate review of this evidence. The argument that because no representative of Lincoln National testified in the trial, it was not possible for the District Court to conclude that Lincoln would have accepted the risk, is as wholly unsound in law as would be the claim that the applicant could not have been found insurable under the petitioner's rules simply because its underwriter, in retrospect, might testify to the contrary. The conclusions of the District Court on the matter of insurability in both the petitioner company and the Lincoln National were based upon the expert testimony of a disinterested witness and as such are hardly subject to impeachment at this late date.

VI.

Conclusion.

As was well stated by Hon. Joseph C. Hutcheson, Jr., Judge of the United States Circuit Court of Appeals, Fifth Circuit, in an article entitled "Law and Fact in Insurance Cases" appearing in 23 Texas Law Review, December, 1944, pages 1 to 17:

"One of the main sources of the difficulties in the

matter of insurance contracts is the difference between the atmosphere in which a policy is issued and that in which losses are settled for. The atmosphere in which it is written is the atmosphere of selling, roseate with promises, express or implied, and the insured, like the sheep before the shearer, opens not his mouth."

* * * *

It is plain that the action of the Circuit Court of Appeals furnishes this petitioner with no ground for certiorari under any of the rules which have been enunciated by this Court up to the present time. Had the Circuit Court of Appeals decided against the respondent, *she* might well have contended that the case was of such general public interest as to merit further review, for a decision against her would have meant that immunity from liability, accomplished by means of the tricky wording of an insurance contract in ambiguous and repugnant terminology, had received judicial countenance. The converse proposition, however, coming from this insurer, is hollow and unjustified, for it can so readily remedy the evil it has created by modifying its forms so that the public will not henceforth be deceived. The petitioner, having resisted its just liability on every tortuous theory that it was able to devise, could hardly have expected that it would be commended by the Circuit Court of Appeals. That court, if it erred in any respect, was guilty only of a modest understatement when it described the petitioner's conduct as "unpardonable".

Respectfully submitted,

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